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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 203

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILLIAM HOBART PORTER AND ANDREW W. PORTER, EXECUTORS OF THE ESTATE OF WILLIAM W. PORTER, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 18, 1930
CERTIORARI GRANTED OCTOBER 13, 1930

SUPREME COURT OF THE UNITED STATES

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1 Before United States Board of Tax Appeals

Docket No. 12734

WM. HOBART PORTER & ANDREW W. PORTER, EXECUTORS OF THE Estate of Wm. W. Porter, deceased (by order dated 2/25/29), petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For taxpayer, Wm. Clarke Mason, Esq., Wm. C. Alexander, Esq. For Comm'r, A. H. Murray, Esq., J. F. Greaney, Esq., Oscar M. McPeak, Esq.

Docket Entries

Mar. 24, 1926. Petition received and filed.
Mar. 26, 1926. Copy of petition served on solicitor.
Mar. 26, 1926. Notification of receipt mailed taxpayer.
May 26, 1926. Answer filed by solicitor.
June 17, 1926. Copy of answer served on taxpayer. General calendar.
Dec. 9, 1927. Hearing date set Feb. 14, 1928.
Jan. 9, 1928. Motion to advance hearing to Jan. 30, 1928, filed by taxpayer.
2 Jan. 11, 1928. Motion granted to Jan. 30.
Jan. 30, 1928. Hearing had before Mr. Littleton on taxpayer's motion for continuance.
Jan. 30, 1928. Order placing on the day calendar of Feb. 28, 1928, entered.
Feb. 23, 1928. Motion for a continuance of one month, filed by taxpayer. See 11807.
Feb. 26, 1928. Motion granted to March 27, 1928.
Mar. 27, 1928. Hearing had before Mr. Murdock on merits. Briefs due June 15, 1928.
Apr. 13, 1928. Transcript of hearing filed March 27, 1928.
May 25, 1928. Brief filed by taxpayer.
June 15, 1928. Brief filed by general counsel. See 11807.
Aug. 28, 1928. Findings of fact and opinion rendered, Murdock. Judgment will be entered for the commissioner.
Aug. 29, 1928. Order of redetermination entered.
Feb. 25, 1929. Motion to change title to William Hobart Porter and Andrew W. Porter, executors of the estate of William W. Porter, filed by attorney.
Feb. 25, 1929. Order substituting Wm. Hobart Porter and Andrew W. Porter, executors of the estate of Wm. W. Porter as petitioners entered.

Feb. 25, 1929. Supersedeas bond for $14,537.20 approved and ordered filed.

Feb. 26, 1929. Petition for review by U. S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer.

Mar. 2, 1929. Proof of service of petition for review filed by general counsel.

Apr. 15, 1929. Præcipe of record filed.

3 Apr. 27, 1929. Motion that board enter order denying petitioner's right to include in record any statement of evidence not in accordance with rules of circuit court of appeals filed by general counsel.

Apr. 26, 1929. Order to enlarge time to May 27, 1929 for preparation of evidence and transmission and delivery of record entered.

May 25, 1929. Motion to enlarge time to July 1, 1929, to prepare evidence and deliver record filed by general counsel.

May 25, 1929. Order enlarging time to July 1, 1929, for preparation of evidence and transmission and delivery of record papers entered.

June 26, 1929. Motion for extension to Aug. 1, 1929, to prepare statement of evidence and transmit record, filed by general counsel.

June 27, 1929. Order enlarging time to Aug. 1, 1929, for preparation of evidence and transmission of the record sur petition for review entered.

July 8, 1929. Agreed statement of evidence lodged.

July 9, 1929. Agreed statement of evidence approved and ordered filed.

Now, July 15, 1929, the foregoing docket entries certified from the record as a true copy.

(Sgd.) B. D. Gamble,
Clerk, United States Board of Tax Appeals.

4 Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed March 24, 1926

JURISDICTION OF THE BOARD

The Commissioner of Internal Revenue by deficiency letter dated February 3, 1926, bureau symbols IT:PA:2-60D-DMR-203 (copy of which is attached hereto) determined a deficiency in income tax against the petitioner for the year 1921 in the sum of $7,268.60.

The taxpayer, an individual residing at 19th and Walnut Streets, Philadelphia, Pennsylvania, hereby appeals from said determination by the commissioner.

STATEMENT OF THE AMOUNT OF DEFICIENCY, ETC.

The amount of the deficiency determined by the commissioner is $7,268.60. The tax is income tax for the calendar year 1921. The amount in controversy is $7,268.60.

ASSIGNMENTS OF ERROR

Determination of the Commissioner of Internal Revenue of deficiency in tax contained in the said deficiency letter is based upon the following errors:

(1) The Commissioner of Internal Revenue erred in disallowing as a deduction from the gross income of the taxpayer for the year 1921 a loss in the sum of $66,900, under the provisions of section 214, A 5, of the revenue act of 1921.

(2) The Commissioner of Internal Revenue having approved ruling of the Solicitor of Internal Revenue upon a point of law under date of August 21, 1923, wherein the deduction heretofore claimed was allowed, and having made a refund to the taxpayer of the amount of the deficiency herein, is not authorized to review and annul said ruling in the absence of fraud or mistake.

STATEMENT OF FACTS

The facts upon which the taxpayer relies as the basis of his appeal are as follows:

(1) Re loss claimed

The taxpayer was, in the year 1906, a stockholder and director of the Real Estate Trust Company of Philadelphia. In said year the said trust company closed its doors and a receiver was appointed by the Court of Common Pleas No. 4, of Philadelphia County, on August 28, 1906.

The financial embarrassment of the Real Estate Trust Company was due to the use of its funds in financing certain projects promoted by Adolf Segal and the taking of collateral for loans to Segal of a character which did not permit of ready liquidation but which had values regarded as substantially in excess of the amount of the loan. The board of directors accordingly, in order to formulate a plan by which the company could reopen, agreed to advance from their own resources to the receiver the sum of $2,500,000 without regard to ratio of stock ownership, upon the agreement by the receiver that he would, with the sum so advanced, form a plan for the reopening of the trust company and further agreement by the receiver to be approved by the creditors that the said slow assets "shall be held as an asset to protect and represent the common stock of this company; but that when the present alleged capital and surplus representing that stock

shall have been worked out, if ever, from said assets so set aside, that should there remain any surplus thereafter at any future time, it shall be divided pro rata among us (directors) according to the amount of our contributions; and that when they are paid, the balance shall be a further asset of this company."

The receiver accordingly promulgated a plan for the reopening of the trust company which was accepted by the creditors and stockholders, and the plan declared operative. The taxpayer, as one of the directors and stockholders, subscribed in cash to the fund referred to above in the sum of $75,000.

The plan of reorganization, insofar as it related to the "Segal matters," provided (par. 4) that "The contributors to the $2,500,000 fund made such contribution with the understanding that if these 'Segal matters' shall be so administered as to realize an amount which would make the capital and apparent surplus whole, they should receive from the company any excess over said amount."

The plan of reorganization became effective, The Real Estate Trust Company of Philadelphia resumed business, and the "Segal matters" were administered by the company under the direction of George H. Earle, jr., formerly receiver, and thereafter president of that company.

The administration of the "Segal matters" proceeded in due course and the contributing directors, including the taxpayer, at all times anticipated reimbursement entire or substantial from the fund, in accordance with the reorganization agreement. The said agreement between the contributing directors was, for various reasons, amended under date of May 5, 1916, wherein a schedule of payments was provided.

In the latter part of the year 1920 it appeared that the liquidation agreement had proceeded as far as possible and that the values at that time for the remaining Segal assets were the maximum which the said assets would have for a substantial period of time. The taxpayer accordingly was offered, in the year 1921, fifty-four shares of stock of the Pennsylvania Sugar Refining Company, having a market value of $150 per share, for the satisfaction of his claim against the said fund, which offer he accepted. The taxpayer accordingly suffered a loss to the extent of the difference between his contribution, to wit, $75,000 and the value of the stock received therefor at that time, to wit, $8,100, or a loss of $66,900.

(2) Re bar to assessment by reason of former ruling

The taxpayer filed his return for the year 1921 without deducting the amount of the loss herein contested. The tax was paid under protest and a claim for refund was filed. A legal point being involved the matter was heard by the solicitor. No dispute of fact arose at the time, and no new facts are now alleged by the commissioner. The opinion of the solicitor was that the loss constituted an allowable

deduction, which opinion as approved by the commissioner and the amount of the tax was refunded to the taxpayer. (See Exhibit B.)

The deficiency letter (copy of which is attached hereto) bases the determination of the deficiency against the taxpayer upon the following sentence contained in the second paragraph:

"In a recent decision made by Solicitor of Internal Revenue, with respect to the Real Estate Trust Company transaction, it is
8 held that no deductible loss was incurred by any of the directors of such company, and the former ruling in your favor is revoked."

It is not averred by the commissioner that any new facts have been presented in order that any fraud or mistake appears in the former ruling.

PRAYER

Wherefore, the taxpayer respectfully prays that the determination of deficiency by the Commissioner of Internal Revenue shall be disallowed.

(Sgd.) WILLIAM C. ALEXANDER, JR.,
Of Porter, Foulkrod & McCollagh,
1201 Chestnut Street, Philadelphia,
Attorneys for Taxpayer.

[*Duly sworn to by Wm. W. Porter. Jurat omitted in printing.*]

9 *Exhibit A to petition*

Form NP-2

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, February 3, 1926.

IT:PA:2-60D
DMR-203

Mr. WILLIAM W. PORTER,
1106 Commonwealth Trust Building,
Philadelphia, Pennsylvania.

SIR: The determination of your income tax liability for the year 1921, as set forth in office letter dated December 17, 1925, disclosed a deficiency in tax amounting to $7,268.60.

In accordance with the provisions of section 274 of the revenue act of 1924, you are allowed sixty days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for
10 the attention of IT:PA:2-60D-DMR-203. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.

By (Signed) C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statements.
Agreement—Form A.
Form 7861—Revised May, 1925.

STATEMENT

IT:PA:2-60D
DMR-203

In re: Mr. William W. Porter, 1106 Commonwealth Trust Building, Philadelphia, Pennsylvania.

Year	Deficiency tax
1921	$7,268.60

As a result of a claim filed by you, there was allowed as a deduction $66,900.00 claimed as a loss in connection with the reorganization of the Real Estate Trust Company of Philadelphia, which resulted in the issuance of a certificate of overassessment in the amount of $7,268.60 representing the entire amount of the income tax paid by you for the year involved.

In a recent decision made by Solicitor of Internal Revenue, with respect to the Real Estate Trust Company transaction, it is held that no deductible loss was incurred by any of the directors of such company, and the former ruling in your favor is revoked.
11 As to the tax liability as shown by your return $7,268.60 is correct, and as such an amount was assessed, and then refunded, there is an additional tax liability of $7,268.60.

Payment should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

Your protest, in relation to the disallowed loss in connection with the reorganization of the Real Estate Trust Company, of Philadel-

phia, has been duly considered. You indicated that a petition will be filed with the United States Board of Tax Appeals covering the entire matter. You are advised that the procedure outlined in the second paragraph of this letter (Form 7681, attached) appears to adequately safeguard your interests, as well as those of other taxpayers concerned, in relation to the filing of the said appeal.

Exhibit B to petition

Solicitor's recommendation on appeal No.

In re: Appeal of Wm. W. Porter, 1106 Commonwealth Bldg., Phila., Pa.

AUGUST 21, 1923.

Mr. COMMISSIONER:
(For Deputy Commissioner Bright,
Head, Income Tax Unit).

This office has had under consideration the appeal of Wm. W. Porter, 1106 Commonwealth Building, Philadelphia, Pa., from the action of the income tax unit in adjusting his tax liability for the year 1921.

After careful consideration of all facts presented, oral hearing having been had by the taxpayer, this office concludes:

"The claim of the taxpayer that he should be permitted to deduct from his 1921 income the sum of $66,900, determined in that
12 year to be a loss, and arising out of a transaction entered into by him and other directors of the Real Estate Trust Company of Philadelphia in 1906 in connection with the reorganization of that company, should be allowed."

Accordingly this office recommends that the appeal of Wm. W. Porter be sustained.

(Signed) NELSON T. HARTSON,
Solicitor of Internal Revenue.

Approved:
(Signed) D. H. BLAIR,
Commissioner of Internal Revenue.

Now July 15, 1929, the foregoing petition certified from the record as a true copy.

[SEAL] (Sgd.) B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Answer

Filed May 26, 1926

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, general counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer, admits and denies as follows:

(1) Admits the allegations of the second paragraph of page 1 of the petition.

(2) Admits the allegations of the third paragraph on page 1 of the petition.

(3) (1) Denies that the commissioner erred in disallowing as a deduction from the gross income of the petitioner for 1921 a loss in the sum of $66,900.

13 (2) Denies that the commissioner is not authorized under the circumstances of this case, to review and reverse a prior decision allowing the deduction herein claimed.

(4) (1) Admits that the petitioner was, in the year 1906, a stockholder and director of the Real Estate Trust Company of Philadelphia; and that in said year said company closed its doors and a receiver was appointed.

Admits that the financial embarrassment of the Real Estate Trust Company was due to the use of its funds in financing certain projects promoted by Adolf Segal, and the taking of collateral of uncertain value and which did not permit of ready liquidation for loans to Segal; that a plan of reorganization was formulated under which the directors of the company were to advance to the receiver the sum of $2,500,000; and that said plan was formulated for the purpose of making possible the reopening of the company.

Admits that the plan for the reopening of the company promulgated by the receiver was accepted by the creditors and stockholders, and was declared operative; and that the petitioner, as one of the directors and stockholders, subscribed in cash to the fund therein provided for the sum of $75,000.

Admits that the plan of reorganization provided that the contributions of the directors were made with the understanding that if the Segal matters should be so administered as to realize an amount which would make the capital and apparent surplus of the company whole, which were assumed to be $3,000,000, the contributors should receive any excess over this amount.

Admits that the plan of reorganization became effective, the Real Estate Trust Company resumed business, and the Segal matters were administered by the company under the direction of

14 George H. Earle, jr., formerly receiver, and thereafter president of the company.

Admits that the administration of the Segal matters proceeded in due course; that the contributing directors, including the petitioner, anticipated partial reimbursement from the fund; and that the said agreement between the contributing directors was amended under date of May 5, 1916, when a certain method of payment was provided for.

Admits that in the year 1920 the parties concerned agreed to terminate the agreement; and that pursuant to such agreement, the petitioner received, in satisfaction of his claim against the fund, fifty-four shares of the stock of the Pennsylvania Sugar Refining Company. Admits that the petitioner claimed a value for said

shares of $150 a share and a loss of the difference between his contribution, to wit, $75,000, and the value of his shares computed on a basis of $150 a share, the amount of said difference being $66,900. Denies that the petitioner sustained said alleged loss.

(2) Admits that the petitioner filed his return for the year 1921 without deducting the amount of the alleged loss herein contested; that the tax was paid under protest and a claim for refund was filed; that a legal point was involved, and the matter was heard by the solicitor; that the opinion of the solicitor was that the alleged loss constituted an allowable deduction, and that said opinion was approved by the commissioner and the amount of the tax was refunded to the petitioner.

Admits that the copy of the deficiency letter attached to the petition is a correct copy of said letter.

(5) Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal of the taxpayer be denied.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
JOHN W. FISHER,
Special Attorney,
Bureau of Internal Revenue.

Now July 15, 1929, the foregoing answer certified from the record as a true copy.

[SEAL.] (Sgd.) B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Docket Nos. 11807, 11832, 11833, 12734

J. I. R. HENRY, EXECUTRIX OF THE ESTATE OF BAYARD HENRY, DECEASED; SAMUEL F. HOUSTON, MRS. SALLIE H. HENRY, WILLIAM W. PORTER, petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Findings of fact and opinion

Promulgated August 28, 1928

A taxpayer who entered into a transaction prior to March 1, 1913, by which he acquired certain rights at a certain cost, but who offers no proof of the March 1, 1913, value of the rights or of its comparison with cost has not established the basis for

a loss on the final disposition of those rights in 1920 or 1921 for a certain amount.

The commissioner may in his discretion reconsider any taxpayer's liability to income and profits taxes originally decided by him at any time within the period of the Statute of Limitations subject only to the provisions of sections 1309 and 1312 of the revenue act of 1921 and corresponding sections of subsequent revenue acts as the same may be applicable.

WILLIAM CLARKE MASON, ESQ.,
JAMES CRAIG PEACOCK, ESQ., and
WILLIAM C. ALEXANDER, ESQ.,
For the Petitioners.

J. F. GREANEY, ESQ., and
OSCAR M. MCPEAK, ESQ.,
For the Respondent.

The commissioner determined deficiencies as follows:

Name	Year	Amount of deficiency
Bayard Henry	1921	$2,891.58
Samuel F. Houston	1920	191,830.53
Mrs. Sallie H. Henry	1921	100,870.20
William W. Porter	1921	7,268.60

Each petitioner alleges that the commissioner erroneously failed to allow as a deduction a loss sustained, arising out of the failure of the Real Estate Trust Company of Philadelphia.

In the case of Samuel F. Houston, the loss was alleged to
17 have been sustained in the year 1920, and in the case of each of the other petitioners, the loss was alleged to have been sustained in the year 1921. In the case of William W. Porter, an additional error was alleged as follows:

"The Commissioner of Internal Revenue having approved ruling of the Solicitor of Internal Revenue upon a point of law under date of August 21, 1923, wherein the deduction heretofore claimed was allowed, and having made a refund to the taxpayer of the amount of the deficiency herein, is not authorized to review and annul said ruling in the absence of fraud or mistake."

J. I. R. Henry, executrix, has been substitute as the petitioner in place of Bayard Henry, deceased.

The cases were consolidated.

FINDINGS OF FACT

The petitioners, Samuel F. Houston, Sallie H. Henry, and William W. Porter, are individuals, residing at Philadelphia, Pa.

Bayard Henry was an individual residing at Germantown, Philadelphia, Pa. He died on September 17, 1926, and J. I. R. Henry is the duly constituted executrix of his estate.

The Real Estate Trust Company of Philadelphia closed its doors in the year 1906, and on August 28th of that year, George H. Earle, jr., was appointed receiver for it by the Court of Common Pleas of

Philadelphia County, Pennsylvania. The financial embarrassment of the Real Estate Trust Company was brought about by the improper conduct of its affairs by its president, Frank Hipple. Hipple loaned excessive amounts to Adolph Segal and took therefor collateral which could not be easily liquidated, but which was
18 not without value. He also wrongfully permitted Segal to withdraw certain of this collateral for the purpose of placing it as collateral for loans from other sources.

The received for the Real Estate Trust Company proposed a plan of reorganization for that company which included as one of its provisions the creation of a fund of $2,500,000 from subscriptions by directors of the company to guarantee a value of $3,000,000 for Segal collateral, designated in the plan "Segal matters." The company was to be given the $2,500,000 outright and then was to have in addition the first $3,000,000 which might be realized from the "Segal matters." The subscribers were to be reimbursed, if at all, by all of the excess over $3,000,000 which might be realized from the "Segal matters." This plan of reorganization became effective. It provided in part that the subscribers to the $2,500,000 fund made such subscriptions with the understanding that if from the administration of the "Segal matters" $3,000,000 should be realized the subscribers were to receive any excess over this amount which might be realized from the same. No restrictions or time limits were placed upon the Real Estate Trust Company in regard to its administration and final disposition of the assets included in the "Segal matters." The Real Estate Trust Company resumed business on November 1, 1906 and thereafter and until December 30, 1920, the "Segal matters" were administered exclusively by it under the direction of George H. Earle, jr., formerly receiver and thereafter president of that company.

The following table shows the names of the directors of the Real Estate Trust Company in 1906, the amount that each subscribed and paid to the guaranty fund, and the number of shares of stock in the company held by each at that time:

Name	Subscription	No. of shares
John H. Converse	$1,005,000	155
Samuel F. Houston	*755,000	515
John F. Betz	153,375	75
William A. Patton	103,000	150
R. Dale Benson	100,625	230
Bayard Henry	92,500	375
(Of this sum Bayard Henry personally contributed $42,500, $50,000 being furnished to him from other sources.)		
Edward P. Borden	77,000	45
W. W. Porter	75,000	175
Frank C. Roberts	75,000	175
S. Wier Mitchell	52,500	553
Joseph de Forest Junkin	11,000	450

* Samuel F. Houston, a director, subscribed $755,000 to the fund and when the plan became effective by the required consents of creditors, stockholders, and others, and the subscribers to this fund were called upon to make payment of their subscription, Houston found that a payment by him of the full amount of his subscription would necessitate a sacrifice of his securities and investments in the then existing market at considerable loss to him, and at his proposal his sisters, and his mother took participating interests in his subscription. Houston actually contributed $305,000 to the fund and his sister Sallie H. Henry contributed $200,000 to the fund.

Sallie H. Henry was not a director, but owned 1,071 shares of stock in the company. She made her subscription upon the understanding that no personal responsibility to her was assumed by Samuel F. Houston, but that she was to look to the so-called "Segal matters" as the source from which to realize upon her subscription. Throughout the transactions involved herein, Samuel F. Houston acted as her agent.

Samuel F. Houston at the time he subscribed to the guaranty fund believed that the "Segal matters" had considerable potential value which under Earle's administration could be converted into a sufficient amount of cash to repay the subscribers the amount
20 of their subscription with interest and possibly some profit in addition. He explained the plan of reorganization to his sister and told her of his beliefs in regard to the value and possibilities of the "Segal matters."

At and before the time that the petitioners herein subscribed to the guaranty fund, George H. Earle, jr., the receiver for the Real Estate Trust Company, had had conversations with the directors in which he expressed a belief that a sufficient amount might be realized from the "Segal matters" to repay to the subscribers the amount of their subscription with interest and possibly a profit.

Segal had secured a loan of $1,250,000 from Gustave E. Kissel. As collateral for this loan, Segal gave certain bonds and stock which had been deposited with the Real Estate Trust Company as collateral security for loans made by it to Segal and which had been wrongfully withdrawn from the Real Estate Trust Company by Segal with the permission of Hipple. Included in this collateral were certain bonds and shares of stock of the Pennsylvania Sugar Refining Company and in connection with the loan it was agreed between Kissel and Segal that until the loan was repaid, Kissel, or some one to be named by him, should have the right to select four out of seven directors of the Pennsylvania Sugar Refining Company and that the latter's refinery should not be operated.

At the time the subscriptions to the guaranty fund were made, a suit against the American Sugar Refining Company under the Sherman Anti-trust Act was contemplated on behalf of the Pennsylvania Sugar Refining Company and the value of the "Segal matters" depended to some extent upon the successful prosecution of such a suit.

Such a suit was brought in the United States District Court for the Southern District of New York for $10,000,000 and another in the Court of Chancery in New Jersey, on the ground that
21 Kissel, as agent for the American Sugar Refining Company, had made a contract in restraint of trade with Segal. In January, 1910, the pending litigation was compromised upon the delivery to the Real Estate Trust Company by the American Sugar Refining Company of certain bonds wrongfully withdrawn from the Real Estate Trust Company, among which were bonds of the Penn-

sylvania Sugar Refining Company. The Real Estate Trust Company afterwards converted the latter bonds, through a foreclosure, into 7,268 shares of stock in the reorganized company, thereafter called Pennsylvania Sugar Company. This was on or before January 22, 1912.

The petitioners were thoroughly familiar with the progress of the liquidation of the "Segal matters" under the administration of the Real Estate Trust Company. Some question arose between the parties in regard to the rights under the subscription agreement including rights to interest and on May 5, 1916, a supplemental agreement was entered into. At this time and for some time prior thereto the principal unliquidated asset of the original "Segal matters" was the 7,268 shares of stock in the Pennsylvania Sugar Company and under the supplemental agreement it was provided that when this stock was disposed of the contributors to the guaranty fund should receive one-fourth of the proceeds.

In the latter part of 1920, the parties concerned, after full investigation, concluded that the liquidation agreement had rendered its maximum of service and that the remaining Segal assets would not have any greater value during a substantial period of time in the future than they then had. Whereupon, the subscribers either individually or by their duly constituted representatives entered into separate agreements which as a group provided for complete liquidation of the "Segal matters" by the Real Estate Company
22 distributing one-fourth of the 7,268 shares of Pennsylvania Sugar Company stock to the subscribers to the fund in proportion to the amount of their subscription in full satisfaction of all agreements of the parties pertaining thereto. The subscribers never received any other return on their subscriptions.

Samuel F. Houston entered into such an agreement on December 30, 1920, and on that date, in accordance with the terms of the agreement, received 548.734 shares of Pennsylvania Sugar Company stock. He, personally, was entitled to 222 of these shares. The remaining shares he received as agent for his sisters and others who had subscribed through him. These latter shares were later distributed to them by him, 158.61 shares being delivered to Sallie H. Henry in the early part of 1921.

Bayard Henry signed an agreement with the Real Estate Trust Company and on January 21, 1921, received as his pro rata share, 37 shares of Pennsylvania Sugar Company stock.

William W. Porter signed such an agreement and on January 23, 1921, received as his pro rata share, 54 shares of Pennsylvania Sugar Company stock.

Each share of Pennsylvania Sugar Company stock received by the petitioners at the time received had a fair market value of $150.

At the end of 1920, Samuel F. Houston wrote off his books as a loss $271,700 computed by deducting the value of the stock which he received from $305,000, the amount of his subscription. In reporting income for 1920 he deducted this amount as a loss.

In reporting his income for the year 1921, William W. Porter deducted $66,900 as a loss, computed by deducting the value of the shares he received from the amount of his subscription. He later paid tax under protest on his income increased by the amount of this alleged loss. He thereafter filed a claim for refund whereupon the commissioner advised him that the amount of the loss claimed had been allowed and enclosed a copy of a letter signed by the Solicitor of Internal Revenue, dated August 21, 1923, stating that the alleged loss constituted an allowable deduction. The commissioner refunded the difference in tax to the petitioner. Thereafter on February 3, 1925, the commissioner sent a deficiency notice to the petitioner in which he stated in part as follows:

"In a recent decision made by the Solicitor of Internal Revenue with respect to the Real Estate Trust Company transaction, it is held that no deductible loss was incurred by the directors of such company and the former ruling in your favor is revoked."

Sallie H. Henry and Bayard Henry on their 1921 returns deducted as losses the difference between the amount subscribed and the value of the shares received.

In the case of each petitioner the commissioner has disallowed the deduction for the alleged loss resulting from the subscription to the guaranty fund.

OPINION

MURDOCK: With the exception of William W. Porter, none of the petitioners herein have pointed to any particular section of the revenue act as authority for the deduction claimed. They all contend, however, that the transaction was entered into for profit. William W. Porter claims the deduction under section 214 (a) (5) of the revenue act of 1921. We will discuss the case as if each petitioner were claiming a loss under this section, or, in the case of Samuel F. Houston, the corresponding section of the revenue act of 1918, because we can think of no other section of these revenue acts which would give any more support to the petitioner's contentions. These sections provide for the deduction of "Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; . . ."

We need not discuss at length the question of whether or not the petitioners entered into this transaction for profit, since for another reason we can not allow the deductions which they claim.

In consideration of the money subscribed and paid to the so-called guaranty fund each subscriber thereto acquired certain rights which were thenceforth his property and which cost him the amount of his subscription. On March 1, 1913, each subscriber still had these same rights. If he disposed of them in 1920 or in 1921, then under section 202 (a) (1) of the revenue act of 1918, as interpreted by the courts and by this board, and under the express provisions of section 202

(b), the loss, if any, from the disposition of those rights, the subject matter of the entire transaction, would be the difference between what was ultimately received for the rights and their cost, or March 1, 1913, value, whichever was lower. (See the acts referred to: Goodrich v. Edwards, 255 U. S. 527; Walsh v. Brewster, 255 U. S. 536; U. S. v. Flannery, 268 U. S. 98; McCaughn v. Ludington, 268 U. S. 106; Aniston City Land Co., 2 B. T. A. 526; Frank C. Stearns, 5 B. T. A. 958; and also Ayer v. Blair, 26 Fed. (2d) 547.)

The subscribers to the so-called guaranty fund in accordance with their agreement paid to the Real Estate Trust Company $2,505,000 in the year 1906. This money was thenceforth the property of the Real Estate Trust Company and the subscribers to the fund were to look solely to the excess proceeds which the Real Estate Trust Company might subsequently realize on certain assets which were called "Segal matters." If and when the amount realized by the Real Estate Trust Company from the administration of these "Segal matters" amounted to $3,000,000, any additional amount which might thereafter be realized from the further administration or disposition of these assets was to belong to the subscribers to the fund. The subscribers could at no time withdraw their subscriptions but if purchaser could have been found they could at any time have sold their rights under the subscription agreement. The Real Estate Trust Company was only required to use due dilligence and reasonable judgment in the administration, disposition, and final liquidation of the "Segal matters." It began to administer these assets in 1906, and it had not completed its task at the end of 1920. We know nothing of the amount realized by the company from any of these assets prior to December 30, 1920. The record in this case gives no basis for a conclusion that during all of this time the value of the rights which subscribers to the fund acquired in 1906, remained constant. No effort has been made to show us what the March 1, 1913, value of the rights in question were or whether indeed these rights had any value on that date. Consequently, we can not do otherwise than approve the determination of the commissioner.

In addition, in the case of Sallie H. Henry, it clearly appears that her brother, Samuel F. Houston, as her agent, received her share of the Pennsylvania Sugar Company stock in the year 1920. The mere fact that he did not deliver the shares to her in person in the year 1920, would not delay the closing of the transaction for income tax purposes or entitle her to deduct any resulting loss in 1921, rather than in 1920.

The petitioner, William W. Porter, has alleged an additional error as set out in our opening statement above. He admits that the decisions of this Board have been adverse to his contention but calls our attention to the case of Woodworth v. Kales, 26 Fed. (2d) 178.

A careful consideration of the latter case leads us to the con-
26 clusion that the decision therein was based upon facts substantially different from those involved in the present case and that the court in deciding the Kales case indicated that it did not intend to decide such a case as is now before us. A case more nearly in point is the Dallas Brass & Copper Co., 3 B. T. A. 856, and following that case we hold against the petitioner. See also James Couzens, 11 B. T. A. 1640, promulgated May 5, 1928, and Rosetta V. Hauss, 12 B. T. A. 755, promulgated June 22, 1928.

Judgment will be entered for the respondent.

Now July 15, 1929, the foregoing findings of fact and opinion certified from the record as a true copy.

[SEAL.] (Sgd.) B. D. GAMBLE,
Clerk, U. S. Board Tax Appeals.

Before United States Board of Tax Appeals

Order of redetermination

Filed August 29, 1928

Pursuant to the board's findings of fact and opinion, promulgated August 28, 1928, it is

Ordered and decided: That, upon redetermination, there is a deficiency for the year 1921 in the amount of $7,268.60.

(Sgd.) JOHN B. MILLIKEN,
Member, United States Board of Tax Appeals.

Enter: Washington, D. C., August 29, 1928.

Now July 15, 1929, the foregoing order of redetermination certified from the record as a true copy.

[SEAL.] (Sgd.) B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

27 Before United States Board of Tax Appeals

Petition for review

Filed February 26, 1929

To the honorable the Members of the United States Board of Tax Appeals:

The petition of William Hobart Porter and Andrew W. Porter, executors of the estate of William W. Porter, deceased, for review of the final decision of the United States Board of Tax Appeals, entered August 28, 1928, in the case of William W. Porter, petitioner v. Commissioner of Internal Revenue, respondent, Docket No. 12734, respectfully represents:

First: William W. Porter was a citizen of the United States of America, and resident of Valley Forge, Schuylkill Township, Chester County, State of Pennsylvania, within the third Federal judicial district. The taxpayer died November 16, 1928, and letters testamentary on his estate were granted to the undersigned petitioners by the register of wills of Chester County on November 21, 1928. Your petitioners are, likewise, residents of the State of Pennsylvania, within the third Federal judicial district.

Second: The nature of the controversy is the determination of a claim for deficiency in income taxes for the year 1921 in the sum of $7,268.60. The commissioner disallowed a deduction taken by the taxpayer from gross income for the year 1921 in the sum of $69,333, representing a loss incurred in a transaction involving a subscription of $75,000 to a certain "Guaranty Fund" entered into for profit by the taxpayer in the year 1906, terminated as to the taxpayer in 1921, when the taxpayer received in liquidation of the said fund, fifty-four shares of the stock of the Pennsylvania Sugar Company aggregating a value of $8,100 in lieu of cash as his share of the proceeds of the transaction.

28 The guaranty fund arose out of financial difficulties of the Real Estate Trust Company of Philadelphia which closed its doors in the summer of 1906, when George H. Earle, jr., was appointed receiver.

The financial embarrassment of the trust company was due to the use of its funds by Frank K. Hipple, its president, in the financing of certain projects, promoted by Adolph Segal, and the taking of collateral of uncertain value for loans to Segal.

The receiver promulgated a plan of reorganization which included as one of its provisions, the creation of a guaranty fund of $2,505,000 under the terms and conditions set forth in the plan, to be used by the trust company pending the liquidation of the Segal collateral, which were referred to in the said plan as "Segal matters," as protection against loss therefrom.

William W. Porter, who was one of the directors and a stockholder, subscribed in his name to the said guaranty fund the sum of $75,000.

No securities, or "rights" negotiable or others, were issued to the subscribers for their payments to make up the "guaranty fund."

The plan of reorganization provided that the subscriptions were made with the understanding that if the "Segal matters" should be so administered as to realize an amount which would make the capital and apparent surplus of the trust company whole, the impairment of which was assumed to be $3,000,000, the subscribers should receive all excess over this amount.

The plan of reorganization became effective November 1, 1906, the Real Estate Trust Company resumed business, and the "Segal matters" were administered by the company under the direction of George H. Earle, jr., formerly receiver, and thereafter president of the company.

An agreement was made between the trust company and
29 the other subscribers, dated as of May 5, 1916, which was supplemental to the original agreement under which the subscriptions were made. This agreement was based on an opinion of John G. Johnson, Esq., as to the status of the several parties to the original plan of reorganization. The taxpayer was advised of this agreement when it was made.

The said supplemental agreement of 1916 provided the basis for the future payments of principal and interest to the trust company and the subscribers. The agreement settled a controversy concerning priority of interest payments which were established as follows: Out of any income or dividends received thereafter by the trust company in each year from such assets of the Segal matters as were not already disposed of, five per cent should be first paid to the trust company upon the balance of the former assumed capital and surplus of $3,000,000 remaining unliquidated, and three per cent should next be paid to the subscribers upon any balance of the fund of $2,505,000 remaining unreturned, and that further income in each year should be applied first to the liquidation of any balance of the trust company's $3,000,000 and after complete liquidation of said amount, the remainder should be applied to the liquidation of $2,505,000 due the subscribers to the guaranty fund.

In the year 1920 the parties concerned agreed to terminate the agreement and dispose of the assets on hand. The parties entered into an agreement on December 30, 1920, for the complete liquidation of the Segal matters by distribution in kind.

The taxpayer received on January 23, 1921, fifty-four shares of stock of the Pennsylvania Sugar Company as his proportionate share of the total number of shares received by him from the trust company. The value of the aforesaid stock was $150 a share, or a total value of $8,100.

30 The taxpayer, in filing his income tax return for the year 1921, did not deduct the loss sustained by him by reason of the aforesaid transaction, but paid his income tax for said year without taking the loss into consideration under protest and filed a claim for refund of said tax by reason of the loss incurred.

The Commissioner of Internal Revenue, respondent, on consideration of the claim for refund, advised the taxpayer that the amount of the loss as claimed had been allowed, enclosing a copy of letter signed by the solicitor making such recommendation, dated August 21, 1923.

The respondent, under date of February 3, 1926, issued a deficiency letter in which he stated:

"In a recent decision made by the Solicitor of Internal Revenue, with respect to the Real Estate Trust Company transaction, it is held that no deductible loss was incurred from the directors of such company, and the former ruling in petitioner's favor was revoked."

The decision of the United States Board of Tax Appeals filed August 28, 1928, affirmed the decision of the Commissioner of Internal Revenue, both as respects disallowance of the loss and as respects right of the commissioner to determine a deficiency notwithstanding his prior decision on the merits. The reason assigned by the Board of Tax Appeals for disallowance of the loss was:

"No effort has been made to show us what the March 1, 1913, value of the rights in question were or whether indeed these rights had any value on that date. Consequently, we can not do otherwise than approve the determination of the commissioner."

Third. That review of said final decision is sought in the United States Circuit Court of Appeals for the Third Circuit.

31 Fourth: That your petitioners make the following assignments of error:

1. The learned board erred in finding the following:

"In consideration of the money subscribed and paid to the so-called guaranty fund each subscriber thereto acquired certain rights which were thenceforth his property and which cost him the amount of his subscription. On March 1, 1913, each subscriber still had these same rights. If he disposed of them in 1920 or in 1921, then under section 202 (a) (1) of the revenue act of 1918, as interpreted by the courts and by this board, and under the express provisions of section 202 (b), the loss, if any, from the disposition of those rights, the subject matter of the entire transaction, would be the difference between what was ultimately received for the rights and their cost, or March 1, 1913, value, whichever was lower."

2. The learned board erred in finding in relation to the guaranty fund that:

"This money was thenceforth the property of the Real Estate Trust Company and the subscribers to the fund were to look solely to the excess proceeds which the Real Estate Trust Company might subsequently realize on certain assets which were called 'Segal matters.'"

3. The learned board erred in finding that:

"The subscribers could at no time withdraw their subscriptions, but if a purchaser could have been found they could at any time have sold their rights under the subscription agreement."

4. The learned board erred in finding as a legal conclusion that:

"The record in this case gives no basis for a conclusion that during all of this time the value of the rights which subscribers

32 to the fund acquired in 1906, remained constant. No effort has been made to show us what the March 1, 1913, value of the rights in question were or whether indeed these rights had any value on that date. Consequently, we cannot do otherwise than approve the determination of the commissioner."

5. The learned board erred in failing to find that the loss claimed by the taxpayer was a guarantor's loss which was not ascertainable until the liquidation value of the obligations guaranteed was conclusively established when the transaction was finally closed as to the guarantor.

6. The learned board erred in refusing to find that the deduction claimed by the taxpayer was lawful to the extent of the difference between the amount of the taxpayer's original participation in the guaranty fund and the amount realized by the taxpayer when the transaction was closed as to him in 1921.

7. The learned board erred in refusing to find that the transaction which was the basis of the deduction claimed was one in relation to which the rule requiring the ascertainment of values as of March 1, 1913, had no application.

8. The learned board erred in refusing to find that the burden was upon the Commissioner of Internal Revenue, respondent, to establish the value as of March 1, 1913, of the participating interest secured by the taxpayer in the guaranty fund in 1906, if such valuation as of March 1, 1913, was relevant, and that the failure of the commissioner to sustain the burden of proof did not impose this burden of proof upon the taxpayer.

9. The learned board erred in refusing to conclude as a matter of law that:

33 "The Commissioner of Internal Revenue erred in disallowing as a deduction from the gross income of the taxpayer for the year 1921 a loss in the sum of $66,900.00, under the provisions of Section 214 (a) (5) of the revenue act of 1921."

10. The learned board erred in refusing to conclude as a matter of law that:

"The Commissioner of Internal Revenue having approved ruling of the Solicitor of Internal Revenue upon a point of law under date of August 21, 1923, wherein the deduction heretofore claimed was allowed, and having made a refund to the taxpayer of the amount of the deficiency herein, is not authorized to review and annul said ruling in the absence of fraud or mistake."

11. The learned board erred in failing to find that the Commissioner of Internal Revenue erred in disallowing the deduction claimed by the taxpayer for the year 1921 and in refusing to disapprove this determination.

12. The learned board erred in entering judgment for the respondent, the Commissioner of Internal Revenue.

Wherefore, your petitioners pray that the United States Circuit Court of Appeals for the Third Circuit may review the action of the Board of Tax Appeals in this cause, reverse the decision of the board and direct the entry of judgment by said board in favor of the

taxpayer, determining that the deduction claimed for the year 1921 be allowed, or for such other and further relief as may appear to the court proper in the premises.

WILLIAM C. ALEXANDER, JR.,
FOULKROD, SHEPPARD, PORTER & ALEXANDER,
Attorneys for Petitioners.

34 [*Duly sworn to by Wm. H. Porter and Andrew W. Porter. Jurat omitted in printing.*]

Now, July 15, 1929, the foregoing petition for review certified from the record as a true copy.

[SEAL.] (Sgd.) B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

35 Before United States Board of Tax Appeals

Docket No. 12734

WILLIAM HOBART PORTER AND ANDREW W. PORTER, EXECUTORS OF THE Estate of William W. Porter, Deceased, petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Statement of evidence

Filed July 8, 1929

The evidence in this appeal consists of a stipulation of facts which was entered into by the attorneys for both parties, and also certain testimony which was taken at the time of the hearing before the board.

Stipulation as to facts

William W. Porter, herein referred to as the taxpayer, was, in the year 1921, a resident of Philadelphia, Pennsylvania.

William W. Porter died November 16, 1928, and William Hobart Porter and Andrew W. Porter, executors of the estate of William W. Porter, deceased, were duly substituted as petitioners.

The appeal involves an income tax for the year 1921 in the sum of $7,268.60. In the year 1906, taxpayer was a stockholder and director in the Real Estate Trust Company. He made a cash contribution of $75,000 to the plan of reorganization as agreed to among the directors. He was a party to the agreements of 1906, 1916, and 1920 hereinafter referred to.

The taxpayer filed his return for the year 1921 and, after claiming the loss mentioned herein and paying the tax under pro-
36 test, he filed a claim for refund. The commissioner, in a letter dated August 21, 1923, advised the taxpayer that the amount of the loss as claimed had been allowed, but subsequently another letter was issued by the commissioner under date of February 3, 1926, which stated as follows:

"In a recent decision made by the Solicitor of Internal Revenue, with respect to the Real Estate Trust Company transaction, it is held that no deductible loss was incurred from the directors of such company, and the former ruling in petitioner's favor was revoked."

The Real Estate Trust Company of Philadelphia closed its doors in the year 1906, and George H. Earle, jr., was appointed receiver by the Court of Common Pleas No. 4, of Philadelphia County, Pennsylvania, on August 28, 1906.

The financial embarrassment of the Real Estate Trust Company was due to the use of its funds by Frank K. Hipple, president, in the financing of certain projects promoted by Adolph Segal, and the taking of collateral for loans to Segal of a character which did not permit of ready liquidation, but were securities of uncertain value.

The receiver promulgated a plan of reorganization which included, as one of its provisions, the creation of a fund of $2,500,000 by the directors of the company to guarantee a value for the Segal collateral, designated in the plan "Segal matters," upon the terms and conditions set forth in this plan.

William W. Porter, the taxpayer, who was one of the directors, subscribed and paid in cash to the so-called guarantee fund the sum of $75,000.

The plan of reorganization, in so far as it related to the "Segal matters" provided that "The contributors to the $2,500,000 fund made such contribution with the understanding that if these Segal
37 matters shall be so administered as to realize an amount which would make the capital and apparent surplus whole, they should receive from the company any excess over this amount."

The plan of reorganization became effective, the Real Estate Trust Company resumed business November 1, 1906, and the Segal matters were administered by the company under the direction of George H. Earle, jr., formerly the receiver, and thereafter the president of that company. The taxpayer was advised from time to time of the progress of the administration of the Segal matters and was familar with and consented to a certain agreement entered into by the Real Estate Trust Company and committee of the contributing directors of which the taxpayer was one as of May 5, 1916.

This agreement was supplemental to the original agreement under which the subscriptions were made and resulted from the opinion of John G. Johnson, Esq., of July 15, 1915, as to the rights of the several parties to the original plan of reorganization.

The liquidation of the Segal matters progressed under the administration of the Real Estate Trust Company until the year 1920, when the parties concerned, after full investigation, were of opinion that the liquidation agreement had rendered its maximum of service, and that the values shown in the latter part of 1920 for the remaining Segal assets were the maximum which such assets would have for a substantial period of time to come.

The parties, by their duly constituted representatives, or in person, thereupon entered into an agreement as of December 30, 1920, whereby it was provided for a complete liquidation of the Segal matters by a distribution in kind.

William W. Porter signed this agreement and received in accordance with the terms thereof, on January 23, 1921, 54 shares
38 of the stock of the Pennsylvania Sugar Company in full and complete satisfaction and discharge of his interest in the Segal matters.

It is agreed that the market value of the common stock of the Pennsylvania Sugar Company as of the early part of 1921 was $150 per share. The loss hereby claimed by the taxpayer was the difference between the subscription of $75,000 and the value of the stock received or $8,100, to wit, $66,900.

The total subscriptions to the shares, the names of the directors of the Real Estate Trust Company in 1906 and the amount of the subscription of each and the number of shares held by them at the time they became subscribers to the guarantee fund are as follows:

Name	Subscription	Number shares
John H. Converse	$1,005,000	155
Samuel F. Houston	775,000	512
(Of this $775,000 only $305,000 was contributed by Samuel F. Houston personally. The balance was contributed by his sisters, Sallie H. Henry and Gertrude H. Woodward, and by his mother, in the respective sums of $200,000, $150,000 and $100,000.)		
John F. Betz	153,375	75
William A Patton	103,000	150
R. Dale Benson	100,825	220
Bayard Henry	92,500	375
(Of this sum Bayard Henry personally contributed $42,500; $50,000 being furnished to him from other sources, his claim, however, being limited to the difference between his personal contributions of $42,500 and the stock which he received.)		
39 Edward P. Borden	77,000	45
W. W. Porter	75,000	175
Frank C. Roberts	75,000	175
S. Weir Mitchell	82,500	533
Joseph deForest Junkin	11,000	450

EXHIBITS

It is stipulated that the following exhibits, Nos. 1, 2, 3, 4, 5 and 9, which were received in evidence without objection, may be included in the record for appeal.

Petitioner's Exhibit No. 1

PLAN FOR REORGANIZATION OF THE REAL ESTATE TRUST COMPANY OF PHILADELPHIA

To the creditors and stockholders of
the Real Estate Trust Company of Philadelphia:

It is so natural to follow the forms to which one is accustomed, that I have again and again started to draw the regulation financial plan that absorbs as much power and gives as little information as possible,—and have as often given up in disgust, at the total uncongeniality and inadequacy of any such method in the present emergency.

If I am now, at last, making progress, it is because I have determined, disregarding precedent, to follow my natural bent and have, as Mr. Roosevelt would say, "A heart to heart talk" with you.

Indeed, nothing else will do. The situation is so complex; the matter is so justly for your determination; on each question there are so many pros and cons that you should, and in all probability will in any event, require full explanation before deciding. So let us begin where we would in any event end.

I am, therefore, now, not only going to give you my recommendations and ask your assent; but I shall as well lay the situation, as I see it, before you; and so try to point out not merely what I think, but just why I believe the adoption of my suggestions is absolutely essential to your welfare.

I desire your first consideration to a matter that gives me great concern. It is obvious that it would be desirable, could I take plenty of time, to work out the value of all assets and definitely ascertain the exact extent of liabilities, including surety and trusteeships, as well also as the possible total of your resources. In an ordinary case, prudence would inevitably demand this; but there are emergencies that make it imperative that fair business risks be courageously taken, and where the ordinary precautions of commonplace affairs would be supine folly.

The first question, therefore, that I ask myself, and now ask you, is: Is this the ordinary or the extraordinary occasion? It is a case where something must be lost by delay and only may be lost by prompt action?

I see no absolutely certain asset that action will deprive you of. I do see, however, how desirable it would be absolutely to know the exact extent and value of our assets and to positively limit our liabilities.

Strenuous efforts are already being made to escape liability by debtors to the company as well as to foist liability upon the company. My confidence in the astuteness and virtue of our courts convinces me they will not succeed. As this is important, I want to illustrate just what I mean. I called a note—I don't remember

whose—but for considerable amount. The alleged maker discovered that he had never signed it nor gotten a dollar of the money. But when I told him that the collateral exceeded the debt by
41 thousands of dollars, the signature so rapidly improved that I am confident it would have become genuine had I but given due time. Apart from this class of cases I should call your attention to another matter. A lawyer called and said that his clients had loaned Segal too much money on his allegation of the merits of a particular enterprise and that as part of the funds might have been paid on indebtedness undoubtedly due to you he would look to us to recoup his possible loss. My counsel agree with me in thinking that fantastic, but so it goes. These are risks that you must take, but you can reassure yourself by remembering that a president's powers are limited, and that the courts are composed of honorable men, astute to limit, not to encourage, the frauds of trustees. Prudent persons do not deal with officers, in matters of magnitude, without certified board action, and both boards and the public have a right to rely on this, and those alleging such procedure are viewed with proper suspicion. But I am determined, so far as in me lies, to thwart any such shabby attempts. A taste for blood once acquired is not easily assuaged, and dishonesty did not die with Hipple. I think it, therefore, imperative that I should be empowered, should counsel deem such claims dangerous, to give you interim protection until the civil or criminal courts can finally dispose of them. I, therefore, ask to be empowered to hold any claim of yours, or any contribution that I may receive in your relief, in such trust as counsel may devise, should they or I deem it necessary to protect it and you against this predatory class. I hope not to use it or need it, but I would fail in duty to you did I not take this precaution.

In addition, that our trust business may be retained and the courts, justified in not disturbing it, I have taken such contributions as I have pledged me upon the express term and condition that until the plan is by me declared operative, they shall be held as a
42 guarantee of the safety of the estates that we hold in trust.

Should I not have these powers, you might either lose the benefit of the trust business, or might find that I had placed the most meritorious and worthy class of creditors at a disadvantage in relation to those who, whether being already of those who have precipitated your troubles or not, will stop at nothing to increase them. In this respect I ask the widest discretion to so handle my trust, or modify the plan, as to give you the fullest protection that I am able. On the whole, were the matters my own, I would chance these risks, provided there were any really compensatory considerations for now so doing.

Let us, therefore, consider what benefits may accrue to you from immediate reorganization.

In the first place, by delay we, of course, lose our trust business and destroy our good will. They must inevitably be gone forever. Now what are they worth and what could they have been made worth with proper management?

If I be correctly informed, before Mr. Hipple's death, your stock sold for say, three hundred and thirty dollars a share. I understand your surplus never exceeded one hundred per cent. If so, your good will was valued, not by mere theorists, but by careful investors on the market, at one hundred and thirty dollars a share; and, as your capital was one million five hundred thousand, the good will that some advise you to ruthlessly destroy was alone worth about two millions of dollars! and that, too (so great is the value of your position), with a president so using your funds as to make it seem strange that you had any business at all; for as he gave Segal so much, there was little left to satisfy the reasonable demands of his patrons.

You know that there are but four corners at Broad and
43 Chestnut Streets, and I would like you to inquire what the stock of the companies that own the other corners and are well managed brings, and I think you will fortify your conviction.

Then we have to consider your building itself. I need not tell you that others have already realized its possibilities, if you do not. Nor that whatever it is worth today it will almost certainly advance largely in value if you keep it—and that gain shall be yours, not outsiders' if I can but have my way!

But let us ignore this as speculative, and still see what further can be accomplished by prompt action.

With men above a certain calibre, all experience has taught me that more can be done by an appeal to duty and honor than by threat or coercion; and so I have thought it my duty to proceed in the way that I am convinced will bring you the best results whether it bring me criticism or praise.

As was my duty, I have carefully looked into this question of liability—and also the ability of the directors to pay, if they be liable. And I feel bound to say to you that I would much prefer the receipt of the ready cash that their sense of honor, and the feeling that, after all, you trusted them, prompts them to give than the possible results of any protracted litigation. It may be invidious to use names, but you already know that many of the board have been severely hit by this failure; some even ruined, for their fault was trusting too much. Others have also been affected by still other disasters and troubles. Still another has his inheritance under a strict trust; and another has long preferred using his income in works of religion and charity to the accumulation of wealth. These facts must be weighed by any sane trustee, even if we have a perfectly clear claim. Again, all experience has demonstrated that the enforcement of such claims always is the cause of protracted and expensive
44 litigation rarely profitable to any one but the members of my beloved profession. But it is my duty also in asking you to

choose between litigation and the receipt in lieu thereof of real money and securities, to call your attention to the viewpoint of courts of justice when considering such claims. For it is as unfair to you to tell you that you are certain to recover as it is to say that you have no chance of so doing.

It is not necessary to trouble you with many cases, but each one of you, whether layman or lawyer, should carefully read the decision in Swentzel v. Bank, 147 Pa. 141. I do not say that that case can not be distinguished from ours, in fact I shall ask counsel to distinguish it, if possible; but I think you will see many points of resemblance.

Now, apart from the fact that the ultimate decision went against the creditors, I want you to note that though the bank failed in 1884, the final decision was not reached until 1892. I admit that that does not invite me.

I do not wish to detain you with quoting at large. But one paragraph of the opinion may well be borne in mind. The court says: "One must be very careful in administering the law of joint stock companies, not to press so hard on honest directors as to make them liable for their constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all."

For myself, I think it just possible that able judges, determining after careful consideration and without excitement, may at times be right and know what is best for us. I am not at all sure that, had the board been composed of men without character or reputation, they would have managed the company any better; and I am quite sure that they would not have been willing or able, for their honor's sake, to contribute two million five hundred thousand dollars, as they are prepared to do in cash and securities if this plan is put into force in your relief, and so as to save the institution with which their names were connected.

I hope you understand that, should I follow my own selfish interests, I would litigate and liquidate, would take no personal risks, and safely collect the compensation, which should be large, but I hope you also know that in that case I would be a worse enemy of you who trust me than even Hippla; for by that course, you must see that I might destroy more value that is easily possible, than has been taken! I cannot be too emphatic. It will be positively criminal not to get rid of me! Before taking my advice, it is your duty to yourselves to ask, "What are his interests?" and before taking any one's else, I beg of you to ask the same question. Not that I nor your other adviser may be dishonest, but that interest unconsciously affects the judgment of us all.

Cudgel my brain as I will, I cannot remove one thought from my mind, and that is, that whatever is left, be our calculations too high or too low, the real question for you to decide is, whether by forcing me to destroy possibly five millions of your property you are adopting the best method of compensating yourself for the loss

of the other five millions that have been stolen? I again beg you not to force me into so uncongenial a task. Indeed, I cannot bring myself to believe that you will. It all seems so simple to me. When we were children, I remember my surprise when I would ask my elders, "What is better than one piece of pie," with tremendous emphasis on the "one," that they so invariably answered "two"; for, strangely, that was the right answer then, and it is no less the right answer now. I know just how badly you have been treated; I know that, perhaps, your digestion is so disordered, for the moment, that, contrary to the teachings of our faith, you might
46 think vengeance would taste sweeter. But it never does, as it is always as bitter to those that inflict it as to those who receive; and I am determined that if in the future, surrounded by a more healthy atmosphere, and with a more normal appetite, you should see someone eating all he pleases on your corner, whilst you stand hungry, you shall never point your finger at me and say that it was my fault. If you have gotten nothing else out of this situation, I am quite as conscious as you are that you are now receiving an unusual financial document, so I feel an explanation is due you.

It is a relief at all times to say just what one feels, particularly when a little overworked and a good deal overwrought; but beyond and above that, ever since this emergency enlightened my eyes, I have felt that I owed the people of our good city an apology.

When Singerly's failure spread devastation broadcast, and I thought I saw, as I think I now see, the one possible chance of full relief—a chance to make millions for the sufferers or for myself, for I could have done either—Mr. Cook and myself elected, as, of course, was our plain duty, to make this profit for the creditors. And when we did make it, after a most trying experience, it was, of course, much that we knew we had done our duty; it was much that such men as the judges, Comptrollers Dawes and Ridgeley, and Theodore Wright, understood; but I must confess that until these last few days there was a sense of disappointment that even those who had benefited by our efforts and sacrifices seemed perfectly unconscious of them. Of course, I was all the while conscious that, after all, it was but a matter of dollars and cents, and did not too much magnify it. But when this trouble arose, and for the first time I realized that everybody had all the while not only noted and appreciated what little we had done, but had a thousand times magnified its importance, I had a feeling of
47 guilt that I can alone appease by working for and talking to you just as I now am. I say this not only because it brings me greater content, but because I think it wholesome that we should all understand that such services as we may render our fellows do not really go unnoted and unappreciated, however much it may so appear.

If, then, you should concur with me that we would better take our chances and save these assets, we must come to the details of our program.

It is my hope that the time may come when you will see that it was to your best interest to have received as much, instead of as little, preferred stock as possible; but I am perfectly conscious that to many of you the loss of all your ready money must have been a great hardship.

It might be better to keep it all in the treasury, but I have concluded to recommend the use of enough of the funds contributed to give each depositor a full third of his deposit in ready cash. I doubt not that you will see the wisdom of still keeping what you do not need, with what will then be your own company, without argument from me.

In the second place, I would issue a stock to be preferred as to both dividends and principal, dollar for dollar, for the balance of such claim or claims as I might not determine it would be wiser to liquidate in cash. The preference as to dividends to be limited to six per cent, but such stock to share equally in any percentage with the common stock, after the common has also received six per cent, and to be redeemed, but either in common stock or cash as the holder may elect, so soon as all stock shall have received a dividend at the rate of eight per cent.

I am informed, although I have had no time for personal verification, that the good assets remaining will certainly put dollar for dollar back of this stock. The present stock will then not be wiped out, but remain as a common stock, having back of it many of
48 of the items of which I have been treating, as well as what are known as the "Segal matters," whether in his name or not. Of course, if those items should ever work out sufficient funds to restore the present supposed capital and surplus, any overplus from them would properly be returned to those who had contributed the funds to make them good; but it is not proposed to make the contributors any other return for their contributions than this, which would obviously belong to them in that happy event.

Should this plan be adopted, it would remove the troublesome question of possible double liability upon the common stock and would save every one from the uncertainties and endless delay and bitterness of protracted litigation. Directors, stockholders, and depositors could, and I believe would, join hands in building this company up to the commanding position that it should occupy. It would have ample capital, absolutely the best situation in Philadelphia, a flourishing trust business, and reasonable good will. There could be no safer place to keep money or place trusts; as, after this experience, one may be certain that care enough will be exercised in this institution at least. On its face, I can scarce think of a financial enterprise more inviting. What trust company is there whose stock was originally issued at par on so favorable terms as this preferred stock will be? I certainly know of none. Already people are asking me if they can procure any of it, and I wish to reserve the privilege to purchase some for myself and my companies should it be on the

market. I fully appreciate all the difficulties and uncertainties, but if there was ever a chance for the creditors of an institution by a little patience to get out, not only without loss, but with possible profit, in my judgment this is the time. It is obvious that however great or small the assets, it is just as imperative that we should also save those of which I have been treating to this end.

49 It is my further suggestion that should these recommendations become operative the then body of stockholders should meet and select their own president and directors, retaining only those whom they think may benefit the enterprise.

You must understand, however, how imperative is prompt action, and should you concur with me, not merely return the enclosed assent as speedily as possible, but see to it that no fellow stockholder or depositor should jeopard both his and your own interest by neglect to act with equal promptitude. I feel, now, that I have fully cleared my conscience and discharged my duty to you. I hope and believe that I have pointed out the way to safety; but it is your sole right to say whether it shall be followed or not.

If you want me to liquidate as receiver, I want you to believe that I shall do my best to realize as much from what will then be a wreck as possible. And I shall, upon receiving John G. Johnson's advice, of its wisdom, institute suit against the directors, and leave its prosecution in his able hands. But, if the receivership be continued, against my advice, I do not want you to charge me with the results, for I am as certain as I live that, do the best I can, the outcome will not and cannot be made to satisfy any one of you. I know that I can but lead you to the water, but I beg of you to remember that if you refuse to drink and are athirst, that I did lead you to the water.

Upon this corner must be reared one of the great financial institutions of the future. It may come soon or late, but it must come. The sole question for you to decide is whether that institution shall be yours, or that of others who are already earnestly seeking it. And that question you must now answer.

(Sgd.) GEORGE H. EARLE, Jr.

September 12th, 1906.

80 *Petitioner's Exhibit No. 2*

PLAN FOR REORGANIZATION OF THE REAL ESTATE TRUST COMPANY OF PHILADELPHIA, FORMULATED BY GEORGE H. EARLE, JR., AS OF SEPTEMBER 12TH, 1906, AS AMENDED AND PERFECTED UNDER SUGGESTIONS OF COUNSEL.

1. The business of the company shall be resumed as soon as the requisite authorization of the necessary increase of its capital stock shall have been voted by its stockholders, or unanimous consent obtained therefor, and the existing deposits shall have been dealt with in the manner immediately hereinafter stated.

2. Upon its resumption of business, the company shall charge, as though the same had been withdrawn by check against the account of each assenting depositor, as the same stood at the closing of the institution on August 28th, 1906, 66⅔ per centum thereof, leaving a balance due to each assenting depositor, of 33⅓ per cent of said amount as the same so stood due at said closing.

In consideration of such charge against such depositor's account, he shall be entitled to receive an equal amount in preferred stock of the said company, to be delivered to him as soon as the certificates can be prepared. In advance of such actual issuance of stock, a temporary certificate shall be delivered to Mr. Earle, which he is authorized to surrender upon receipt of the final certificate. Mr. Earle's receipt for such temporary certificate shall operate with like force and effect as if such assenting depositor had been actually paid, on account of his deposit, in cash, the sum of 66⅔ per cent of the amount thereof.

51 3. The preferred stock so to be issued to each assenting depositor shall be preferred as to principal in any distribution or liquidation of the principal assets of the company. It shall also, to the extent of six per centum per annum, be preferred as to dividends. No dividends shall be declared upon the common stocks so long as the holder of the preferred shares shall have failed to have had declared, in his favor, dividends at the rate of six per centum per annum. After the preferred shares shall have had dividends declared in their favor, to the extent of six per centum per annum, the common stock shall be entitled to dividends until the amount declared thereon shall be equal to the percentage (six per centum per annum) which shall have been declared upon the preferred shares. Thereafter, in any further declarations of dividends, the preferred and common stock shall share alike, pro rata.

The preferred stock having been issued to finance the company, with an understanding that it should be redeemable and should be retired and cancelled, to a certain extent, under certain circumstances, such preferred stock shall be redeemable at any time after, in any one year, dividends upon both preferred and common stock, at the rate of eight per centum per annum, shall have been received by the holders of both preferred and common shares. The redemption shall be, as the holders shall elect, either in common stock at par or in cash.

The company reserves the right, with the assent of the holders of preferred shares, to purchase such shares at any time hereafter at such price as, legally, can be paid by it.

4. At the time of the failure of the company it held what are known as the "Segal matters," which designation included not merely transactions in the name of Adolph Segal; but also

52 other transactions brought about by him or in which he, in some way, directly or indirectly, was interested or had been concerned. The aggregate of these matters was about $5,300,000. Had they been worth their face value, the corporation would not

have been insolvent. A schedule of such items to be filed with the commissioner of banking to prevent future controversy.

The contributors to the $2,500,000 fund made such contribution with the understanding that if these "Segal matters" shall be so administered as to realize an amount which would make the capital and apparent surplus whole, they should receive from the company any excess over said amount.

If these matters, when administered, shall realize, in cash or its equivalent, to the company an amount in excess of $3,000,000 (representing the supposed former capital and surplus), any such excess, so realized, as realized, shall, from time to time, be paid to said contributors in proportion to the amounts by them respectively contributed.

Until the amount of their contributions, with interest, shall have been reimbursed, said "Segal matters" shall constitute part of the assets or capital of the company, subject only to this provision of conditional payment of excess to said contributors.

5. The issuance of preferred stock as proposed and the contribution of $2,500,000 have been made with the intention of protecting the interests of all existing bona fide creditors, and of securing equality of distribution amongst them as far as possible. The plan has been accepted and is intended to be carried out without benefiting in any way persons who may hereafter present claims, not now known to the directors, concealed from them for the present, improperly.

It is intended, therefore, as far as possible to protect those
53 who have approved the plan and have made their contributions, from unforeseen and suspicious claims.

To this end, and for this purpose only, the contributors of the $2,500,000 fund have assigned to George H. Earle, jr., as trustee for the holders of preferred stock, a right to demand from the company a return of their contribution with interest, in case of the presentation of claims at present unknown to the board of directors, which, by their vote hereafter, they shall declare suspicious.

If, at any time hereafter, the directors of the company shall deem it to the interest of the company, because of the presentation of such unforeseen or suspicious claims, to confess a judgment in favor of said Earle, as trustee, for the amount of such contributions, viz, $2,500,000 with interest, they may do so, and Mr. Earle shall be entitled, as trustee for the holders of the preferred stock, to make such use of said judgment as in his discretion shall be deemed best to protect them against ill results from such claims. Such use, however, shall not in any way prejudice the rights of creditors of the trust company whose indebtedness shall hereafter be incurred. The rights reserved above in favor of the holders of the preferred stock shall be subject to the duty of protection in the first instance of any such subsequent creditors.

In case of vacancy in the trusteeship by the death or resignation of Mr. Earle or any successor, the board of directors shall be authorized from time to time to elect a successor.

Whenever, hereafter, the trustee shall deem all danger of such unforeseen claims to be at an end, he shall be authorized to enter into such agreement with the company as shall terminate any further liability, even conditional, for said advance. The utmost latitude of discretion may be exercised by the trustee under this clause,
54 and his use of the power conferred upon him shall be solely to the extent and for the purpose prescribed, and without liability in case of error of judgment. As heretofore stated in the plan, the contribution of $2,500,000 by the directors of the company, shall be taken as having been made by way of indemnity against and release of all claims by the company, for the benefit of such assenting stockholders or creditors, or by such assenting stockholder or creditor.

6. It shall be the duty of the assenting holders of the existing certificates of common stock of the company, without delay, to present the same at the office of the company in order that said certificates may be properly stamped as subject and entitled to the conditions and benefits of this plan of reorganization.

7. All the provisions of the original plan, permitting payments in cash, shall remain unimpaired. The company shall have power, if it shall so desire, to issue and dispose of preferred stock, at not less than par, in the case of deposits not covered by assents, to the extent of two-thirds of such deposits, in order that if it shall deem it necessary, it may thus raise funds necessary to meet the claims of such depositors. Nothing herein contained is intended to prevent such purchases by the company as may be legal, from assenting depositors, to whom preferred stock shall be issued, if it shall so desire.

(Sgd.) GEORGE H. EARLE, JR.

OCTOBER 24th, 1906.

55 *Petitioner's Exhibit No. 3*

OPINION

As part of the plan for the reorganization of the Real Estate Trust Company of Philadelphia, formulated with extraordinary ability by Mr. Earle, certain directors contributed a fund, amounting to $2,500,000, to the company.

The plan as revised and ultimately adopted, differed in respect to this contribution somewhat in phraseology, though but little in substance from that embodied in Mr. Earle's original phraseology.

Mr. Earle, after referring to what he called the "Segal matters," said:

"Of course, if these items should ever work out sufficient funds to restore the present supposed capital and surplus, any overplus thereafter would properly be returned to those who had contributed

the fund to make them good; but it is not, proposed to make the contributors any other return for their contributions than this which would obviously belong to them in that happy event."

The ultimately adopted plan, which alone must be interpreted, dealt thus with these contributions:

"4. At the time of the failure of the company it held what was known as the 'Segal matters,' which designation included not merely transactions in the name of Adolph Segal; but also other transactions brought about by him or in which he, in some way, directly or indirectly, was interested or had been concerned. The aggregate of these matters was about $5,300,000. Had they been worth their face value, the corporation would not have been insolvent. A schedule of such items is to be filed with the commissioner of bank-
56 ing to prevent future controversy. The contributors to the $2,500,000 fund made such contribution with the understanding thtat if these 'Segal matters' shall be so administered as to realize an amount which would make the capital and apparent surplus whole, they should receive from the company any excess over said amount. If these matters when administered, shall realize in cash or it equivalent, to the company an amount in excess of $3,000,000 (representing the supposed former capital) any such excess so realized, as realized, shall, from time to time, be paid to said contributors in proportion to the amounts by them respectively contributed. Until the amount of their contributions, with interest, shall have been reimbursed, said 'Segal matters' shall constitute part of the assets or capital of the company, subject only to this provision of conditional payment of excess to said contributors."

My opinion has been asked with reference to the interpretation of this part of the reorganization plan. The nature of the question will appear by my answer:

The answer, I regret to say, is one concerning which there may be a decided difference of judgment which is to my discredit, as the phraseology of the revised plan was mine and it was my duty to use such phraseology as would not permit of any doubt as to the meaning of the same thereafter arising.

What I had in my mind when I wrote the words which I have quoted is not now in my memory with any certainty, which is all the better, because it is not what I thought, but what is properly deducible from what I wrote and was accepted.

In like manner I could not be influenced by what was in Mr. Earle's mind at the time: (1) Because, again, the written language must be construed and not the unwritten thought, and (2) because if there is any difference in phraseology, it is the later and not the earlier which must be interpreted.
57 In point of fact, however, the conclusion which I have reached as to the proper interpretation of the revised plan would be reached by me with equal confidence if the original had been incorporated ipsis verbis in the revised plan.

Of course, the "Segal assets" were assets and capital of the company. The latter never parted or agreed to part with title thereto.

I am not helped, therefore, in my interpretation by the fact that it is stated that these matters "shall constitute part of the assets or capital of the company."

The question is not whether they were part of the company's assets; but what rights existed and exist in the company and in the contributors with reference to the same.

This question is expressed in the concluding line of the sentence, in which it is said that these assets of the company are "subject only to this provision of conditional payment of excess to said contributors."

It is the conditional provision of excess that we are to determine. The last paragraph throws us back upon the preceding one and compels us to reach our conclusion as to the meaning by their consideration.

These "Segal matters" were assets that had aggregate value considerable in amount. In fact they were valued at, or nearly at, $775,000. They were not in such shape, however, in which either company or contributors desired their value as between themselves to be determined. There was no market in which they could probably be reasonably well disposed of. They required to be "administered."

The company, asserting its right to these assets as its property, agreed to administer them in a way which might result in benefit to the contributors. This administration became a duty. It did not limit itself in the manner of this administration. The
58 discretion as to when and how these assets should be administered was reposed in it alone. The contributors were entitled to nothing other than an honest administration by the company, exercising ordinary prudence and intelligence.

Had the company years ago determined that it was proper to sell, say, the Pennsylvania Sugar Refining Company's stock and had it sold the same, the amount of the proceeds thus realized alone could have been claimed in an accounting by the contributors. This would have been the case even though, at a later time, these shares could have been sold for double or treble the value thus obtained.

Of course, the company could not make a pretense of a sale; parting, apparently, with the title and reserving the benefit for itself. An honest sale, however, through any third person of any assets, determined the amount to be credited when the general account should be taken.

An administration of these assets involved every method of obtaining value therefrom. It involved not merely the obtaining proceeds of sale; but also the obtaining of income and dividends therefrom.

However, cash or its equivalent should be realized from these "Segal matters," the amount realized was an item to be considered

in determining whether there was or was not an "excess" within the meaning of the contract.

Concerning these assets, the company agreed that there should be a segregation, at least so far as concerned the account of what should be realized therefrom. Without any limitation as to how anything should be realized therefrom, whether by way of dividends, income, or sale, the company agreed that what was realized should be accounted for.

As each of the original items of the "Segal matters" was
59 converted into cash or its equivalent, it was the duty of the company to credit to the account the amount of such realization, having previously credited the account with any dividends or income collected from such assets before conversion.

Had none been thus collected, the amount to be credited would be the proceeds of sale. Had some been collected by way of income or dividends, the amount to be credited would be the amount received at the sale, plus such income collected in excess.

In my opinion the company immediately upon the realization of the cash or its equivalent for one of the "Segal matters," was entitled to use the proceeds free of all obligations. It might invest or not invest. In case it should invest, the contributors, having been credited with the proceeds, had no further right to the income thereafter derived therefrom.

If the amounts thus from time to time credited became equal to the sum of $3,000,000, any remaining "Segal matters" not theretofore converted into cash or its equivalent, must be delivered to the contributors.

If the aggregate of realization never reaches that sum, any right of reimbursement to contributors will thereupon end.

There is some question whether the proceeds of realization shall not be kept separately accounted for and any income derived from investment credited to the contributors; but I cannot bring my mind to the conviction that such is the right of the matter.

I can only see my way to an allowance to them of everything derived in cash or its equivalent from the original assets until conversion, and an allowance upon the conversion of each asset of the amount in cash or its equivalent derived therefrom.

It may be urged that my interpretation is inconsistent and that there is no more reason why the income of the original assets
60 should be credited to the contributors' account than that the income of the proceeds should not thus be credited.

Notwithstanding the possible inconsistency, it would seem to me to be abnormal to compel the company, after the asset had reached its ultimate form, i. e. conversion into cash or its equivalent, to require that the cash or its equivalent should continue to be invested and reinvested.

Of course the company is not entitled to demand that the realization from the "Segal matters" shall be $3,000,000 plus interest. It

is too clearly stated that when the amount of realization is in excess of $3,000,000, the right of the contributors attaches, to construe these words "in excess of $3,000,000 and interest."

Interest is to be allowed in case of an excess sufficient in amount; but it is to be allowed only to the contributors upon the amount of their contributions.

In my judgment, therefore, the contributors are entitled to any excess in the realization of the "Segal matters" which will arise after there has been received from the "Segal items" by way of proceeds of sale, and income anterior to their conversion, the sum of $3,000,000.

I have had the benefit in investigating the subject of the opinion prepared by the executive committee and the pertinent remarks and reasoning of Mr. Earle.

In answer to a question which has been put to me I say, that in case of misunderstanding or difficulty as to the administration of any of the assets, it would be quite legal for the company's board and the committee representing the contributing directors, to reach an understanding; but I do not think that the company in the administration of the assets, has any other duty than that of honest administration, to the best of its ability, and I do not think that it is bound to consult the contributing directors, although it is proper that such consultation shall be had.

61 Perhaps I should add that I do not agree with the theory of the committee that the contributors are entitled to a credit of $775,000 or of any amount fixed as the value of the "Segal matters" at the time of the plan. There is to be no taking into consideration of any values excepting those which should be realized. Should that realized be in excess of $775,000, it would be to the advantage of the contributors pro tanto; but should it be less than that amount, the contributors certainly are not entitled to this appraised or, for the time being, accepted value.

JOHN G. JOHNSON.

July 15th, 1915.

Petitioner's exhibit No. 4

Whereas, at the reorganization of "The Real Estate Trust Company of Philadelphia" sundry of the directors made contributions of $2,500,000, subsequently increased to $2,505,000, to further the same because of an apparent depreciation in the value of the so-called "Segal matters" upon terms as set forth in the circular and contract relating thereto, inter alia, as follows:

"The contributors to the $2,500,000 fund made such contribution with the understanding that if these 'Segal matters' shall be so administered as to realize an amount which would make the capital and apparent surplus whole, they should receive from the company any excess over said amount.

"If these matters, when administered, shall realize, in cash or its equivalent, to the company an amount in excess of $3,000,000 (representing the supposed former capital and surplus), any such excess, so realized, as realized, shall, from time to time, be paid to said
62 contributors in proportion to the amounts by them respectively contributed.

"Until the amount of their contributions, with interest, shall have been reimbursed, said 'Segal matters' shall constitute part of the assets or capital of the company, subject only to this provision of conditional payment of excess to said contributors."

And whereas, in a matter so complicated and fraught with the possibilities of subsequent difference of opinion and interpretation, it was thought desirable that plenary and irrevocable power should be placed in a committee of the contributing directors for the purposes of adjustment with the Real Estate Trust Company of Philadelphia should difficulties arise, as is set forth in said contract (a copy of which is attached hereto, marked "Exhibit A."

And whereas, such divergences of opinion have arisen which may require litigation to decide, or necessitate an immediate disposal for the administration of the remaining assets, which is deemed to be inadvisable by both the committee and trust company; and it is deemed advisable in the interest of all concerned in such assets to presently settle finally all questions raised, or which might or could be raised, as to the future administration of such assets, and to finally define the complete method and character of such administration.

Now, therefore, it is agreed by and between the said committee of directors as now constituted, and acting on behalf of all the contributors, and the said "The Real Estate Trust Company of Philadelphia;"

First: That all of the "Segal items" are to be and remain part of the permanent capital and assets of the said the Real Estate Trust Company of Philadelphia in complete and undisputed ownership.

63 Second: That an accounting is to be made of such assets as have been so far realized upon, and also, from time to time, of such amounts of principal as come from the Altoona mortgages, and the sums thus ascertained and received are to be applied, as far as possible, to the liquidation of the claim of the Real Estate Trust Company of Philadelphia for the said $3,000,000 against such assets.

Third: That out of any income or dividends received hereafter by the Real Estate Trust Company of Philadelphia during each calendar year from such assets as are not already disposed of, five per cent per annum shall be first paid to the said the Real Estate Trust Company of Philadelphia, but not cumulatively, upon such balance of said $3,000,000 as remains unliquidated from time to time; three per cent per annum, but not cumulatively, shall be next paid upon any balance of said $2,505,000, remaining unreturned, pro rata and proportionately, to the contributors of the said $2,505,000 fund;

and if there be any further remainder of such income in any such year, it shall be applied, first, to and towards the entire liquidation of the remainder of the $3,000,000 first due from such assets as aforesaid to the Real Estate Trust Company of Philadelphia, and when that is completely liquidated, then any remainder shall be applied to and towards the entire liquidation of the remainder of the $2,505,000 due secondly to the said contributors, without interest.

Fourth: That as a further consideration and adjustment that would make possible the participation of the contributors to the $2,505,000 fund so as to secure at least some return upon their equity, it is hereby provided and agreed that should the Real Estate Trust Company of Philadelphia, in its discretion, dispose of any or
64 all of the stock of the Pennsylvania Sugar Company, owned by the trust company as part of the "Segal matters" twenty-five per cent of the proceeds of such sale or sales, or so much thereof as may be required to return the contributions without interest, shall thereupon be distributed pro rata among the contributors to the said $2,505,000 fund on account of their contributions up to the amount of the same, which at that time shall remain unreturned. The remainder of the proceeds of any such sale or sales shall be and remain the absolute property of the Real Estate Trust Company of Philadelphia.

In witness whereof, the parties hereto, being members of a committee of the board of directors of the Real Estate Trust Company of Philadelphia, composed of members of the board who were not contributors to the reorganization fund of the Real Estate Trust Company of Philadelphia, to whom this matter has been referred, with power to act, and acting on behalf of the Real Estate Trust Company of Philadelphia, and the members of a committee of the contributing directors to the reorganization fund of the Real Estate Trust Company of Philadelphia, acting for themselves and the other contributors to the aforesaid fund, have hereunto set their hands and seals, this fifth day of May, A. D. 1916.

Sealed and delivered
in the presence of:

(Signed)

Jno. A. McCarthy — S. F. Houston [SEAL.]
R. Edward Ives as to R. Dale Benson — R. Dale Benson [SEAL.]
Jno. A. McCarthy — W. A. Patton [SEAL.]
Jno. A. McCarthy — G. H. Earle, Jr. [SEAL.]
— Rich'd Y. Cook [SEAL.]
Chairman

R. Edward Ives as to John Gribbel — Jno. Gribbel [SEAL.]

65 *Exhibit "A"*

Whereas, R. Dale Benson, John F. Betz, John H. Converse, W. A. Patton, E. P. Borden, S. Weir Mitchell, Joseph deF. Junkin, S. F. Houston, Bayard Henry, Frank C. Roberts, and W. W. Porter contributed the sum of two million five hundred thousand dollars ($2,500,000) in order to make effective the plan of reorganization of the Real Estate Trust Company of Philadelphia, and it was thereupon agreed by the said the Real Estate Trust Company of Philadelphia that after the payment to it of the sum of three million dollars ($3,000,000), to be realized from what are known as the "Segal claims" any sum or sums in excess of the said three million dollars ($3,000,000) should be applied to the reimbursement of the parties hereinabove named in the proportions of their respective contributions;

And whereas, it is deemed advisable that a committee of three persons of the above named contributors of the said two million five hundred thousand dollars ($2,500,000) should be appointed with plenary powers to act on behalf of all of the contributors as aforesaid in any transaction or transactions where the "Segal claims" may be involved, with the end in view of disposing of the said "claims."

And now this agreement witnesseth that the parties hereto, being all of the contributors to the said fund of two million five hundred thousand dollars ($2,500,000) paid as aforesaid, for and in consideration of the mutual covenants, promises, and agreements herein contained, do covenant, promise, and agree to and with each other as follows:

I, John H. Converse, Samuel F. Houston, and R. Dale Ben-
66 son are hereby appointed a committee of three, as agents, representatives, and attorneys for all of the contributors to the reorganization fund of two million five hundred thousand dollars ($2,500,000) paid to the Real Estate Trust Company of Philadelphia, by the undersigned, with full power to do any and all things, execute any and all documents, enter into any and all negotiations and agreements respecting the "Segal claims" of the Real Estate Trust Company of Philadelphia, for the purpose of realizing upon the said "Claims" with the same force and effect as though each one of the said contributors to the said reorganization fund in his individual capacity was acting in the premises, and any or all things done and performed, whether in the form of compromises, adjustments, agreements, or otherwise, in any way whatsoever, shall be as though done and performed by each one of the contributors to the said reorganization fund and the parties to this agreement.

II. The said committee, consisting of Messrs. Converse, Houston, and Benson, shall be self-perpetuating, and upon the death or incapacity of any one or several of the said committee, the survivor or survivors may select from the parties hereto an additional member or members to make up the full membership of three, as herein provided.

III. The appointment of the said Converse, Houston, and Benson is irrevocable, except as hereinafter provided, and is binding upon the heirs, executors, administrators, and assigns, of the parties hereto; and in the event of the death or incapacity of any of the parties hereto, this agreement shall not be revoked thereby, but shall be deemed to be in full force and effect and binding as aforesaid upon the heirs, executors, administrators, and assigns of the parties hereto.

67 IV. At any time hereafter, by a writing or writings duly executed by parties holding or legally representing three-fourths of such contribution, this instrument may be modified, or entirely revoked and canceled, in such manner as such majority may determine and direct.

In witness whereof, we have hereunto set our hands and seals this day of November, A. D. 1907.

Witnesses:

Petitioner's Exhibit No. 6

Converse committee joins in, approves, agrees to and ratifies this adjustment.

S. F. Houston,
W. A. Patton,
Frank Roberts,
Converse Committee.

This agreement, made this thirtieth day of December, in the year of our Lord one thousand nine hundred and twenty (1920), between the Real Estate Trust Company of Philadelphia, a corporation organized under the laws of the State of Pennsylvania (hereinafter called trust company), and Samuel F. Houston, of the city of Philadelphia, State of Pennsylvania (hereinafter called Houston).

Whereas, Samuel F. Houston, as a director of the Real Estate Trust Company of Philadelphia, contributed the sum of seven hundred and fifty-five thousand dollars ($755,000.00) to the fund created by various directors of the company, in accordance with a plan or reorganization formulated as of September 12th, 1906, which

68 said plan was formally approved by the banking commissioner of Pennsylvania and by the court having jurisdiction of the subject-matter at that time. The rights of the contributors and the trust company to the said fund are further set forth in an agreement dated May 5th, 1916, which plan and agreement, by this reference thereto, are made part hereof:

And whereas, "Converse Committee," herein referred to, was a committee appointed by agreement dated the day of November, 1907;

And whereas, the contributing directors, with the amounts of their contributions to the said reorganization fund, are as follows:

John H. Converse	$1,000,000.00
Samuel F. Houston	755,000.00
John F. Betz	153,875.00

William A. Patten	$103,000.00
R. Dale Benson	100,625.00
Bayard Henry	92,500.00
Edward P. Borden	77,000.00
W. W. Porter	75,000.00
Frank C. Roberts	75,000.00
S. Weir Mitchell	52,500.00
Joseph deF. Junkin	11,000.00

And whereas, Houston and trust company have reached an agreement finally settling and determining their respective rights and interests in said fund and under said plan of reorganization and agreement of May 5th, 1916, whereby the said Houston is entitled, subject to the conditions hereinafter set forth, to five hundred and forty-eight and seven hundred and thirty-four thousandths (548.734) shares of stock of Pennsylvania Sugar Company;

Now this agreement witnesseth, that the parties hereto, for and in consideration of the mutual covenants and agreements hereinafter set forth, do covenant, promise and agree to and with each other as follows:—

First: Trust company will assign, transfer and deliver to Samuel F. Houston five hundred and forty-eight and seven hundred and thirty-four thousandths (548.734) shares out of its holdings (amounting in all to seventy-two hundred and sixty-eight (7268) shares) of the capital stock of Pennsylvania Sugar Company which have grown out of the "Segal matters," referred to in said plan of reorganization.

Second. Said Houston hereby accepts said five hundred and forty-eight and seven hundred and thirty-four thousandths (548.734) shares in full settlement and release of all his rights of, in and to any of the matters growing out of said reorganization fund of two million five hundred thousand dollars ($2,500,000), and under or by virtue of said plan of reorganization and agreement dated May 5th, 1916, and does hereby remise, release, quitclaim and confirm unto the said trust company all of his right, title and interest in and to all of the assets and property, of every kind and description, known as the "Segal matters," or growing thereout, or which are the result of any asset or right which the trust company had or was entitled to at the time of said reorganization, so that the same shall be the absolute property of trust company, free and discharged from all trusts, contracts or claims of whatsoever kind or nature growing out of said reorganization plan or said agreement of May 5th, 1916, or otherwise; and does further remise, release and discharge the said trust company, its officers, directors and stockholders, of and from all claims and demands growing out of or by reason of said contribution of seven hundred and fifty-five thousand dollars (755,000), and hereby confirms and approves all that has been done, or omitted to be done, by either the trust company, its officers, directors or employees, or by said Pennsylvania Sugar Company, its officers, directors or employees, in the administration of the said "Segal matters" or of the property of said sugar company.

Third. For a period of five years from the date of this agreement, Houston shall not have the right to, and covenants that he will not, sell, assign, or otherwise dispose of the shares of the stock of said sugar company delivered hereunder until he has given, in the manner hereinafter provided, to the other contributing directors and to the Real Estate Trust Company of Philadelphia the right to purchase the same at the highest price that he is then offered in good faith for the same. In the event that Houston shall receive any bona fide offer to purchase all or any part of said stock at a price which he is willing to accept, he shall notify in writing said The Real Estate Trust Company of Philadelphia of the fact and terms of such offer, and such company shall have five days from the day on which notice is received to purchase said stock for cash at the same price; in the event that said The Real Estate Trust Company of Philadelphia does not purchase within said period, then Houston shall be relieved from the restrictions and obligations of this paragraph to the extent of the stock covered by said offer, and Houston shall be free to dispose of the same without regard to this agreement. If the said The Real Estate Trust Company of Philadelphia does exercise its right to purchase, said purchase shall be for account, first, of such contributing directors as shall, on demand, actually pay for their pro rata share of the stock offered (it being understood that if any contributing director does not actually pay for his pro rata share, then the other contributing directors, in the proportion of their respective holdings, shall have the right to purchase and pay for on demand), and, second, to the extent that the offered stock shall not be taken and paid for by the contributing directors, said trust company may still elect to purchase in its own right.

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Rights to subscribe to the stock of the Pennsylvania Sugar Company, which may hereafter accrue by virtue of Houston's holdings of stock delivered hereunder, shall be subject to the same terms, conditions and restrictions as are above set forth; and if Houston declines to exercise said rights and is unable to sell or dispose of the same in the way and manner hereinbefore set forth, said rights shall be, pro rata, assigned to the other contributing directors, in proportion to their then holdings of stock delivered to them under this agreement, at least five days before the expiration of the time when said rights must be exercised. No provision in this agreement shall limit or restrict the disposal of the stock covered hereby either by will or under the intestate laws, or in pursuance of any decree of distribution based upon any will or the provisions of the intestate laws, but the persons taking the same shall be subject to the same limitations, as to the sale or disposal thereof, as by this agreement are imposed upon the said Houston.

Fourth. "Contributing directors" shall mean, whenever used in this agreement, any of the original contributors to the reorganization fund (or the representatives, either in fact or in law, of those con-

tributing directors who are deceased or incapacitated) as shall become parties to this agreement.

Fifth. Said Houston hereby releases, quitclaims and forever discharges the Converse committee, and each and every member of said committee, past as well as present, of and from all claims and demands for or by reason of any act done, or omitted to be done,
72 by said Converse committee, and further hereby confirms and ratifies all acts done by said Converse committee, and approves of the course taken by said committee as to anything omitted to be done.

Sixth. This agreement is made upon the express condition that in the event of the failure of the stockholders of trust company, at its next annual meeting, to approve and confirm the action of its officers and directors in entering into this agreement, trust company shall have the right to revoke this agreement, and thereupon it shall become the duty of said Houston to reassign and transfer to trust company said five hundred and forty-eight and seven hundred and thirty-four thousandths (548.734) shares of Pennsylvania Sugar Company stock and any new issue of said Pennsylvania Sugar Company stock to which said Houston may become entitled to subscribe by virtue of his record holding of said five hundred and forty-eight and seven hundred and thirty-four thousandths (548.734) shares, and for which he has actually subscribed and paid for, together with any dividends that may have been declared and paid thereon in the interim; for any new stock so subscribed and paid for by Houston, trust company shall pay him the amount paid by him with interest at six per cent. In the event of said revocation, the rights of the parties hereto shall be saved and remain as defined and stated in the agreement of May 5th, 1916, joined in by the said Houston.

Seventh. This agreement, although signed only by the said Houston, shall, with other identical agreements with such contributing directors as shall sign same, constitute one agreement, with the same force and effect as if all of them had signed one instrument.

Eighth. All certificates of stock delivered to the said Houston shall have thereon endorsed the following:
73 "This certificate of stock is subject to the terms and conditions of a certain agreement dated the thirtieth day of December, 1920, between the Real Estate Trust Company of Philadelphia, of the first part, and Samuel F. Houston, of the second part, and may be transferred only under and subject to said agreement, a copy of which is lodged with the Real Estate Trust Company of Philadelphia."

Ninth. The Real Estate Trust Company of Philadelphia agrees that if at any time hereafter it undertakes to negotiate a sale of all or any part of its holdings of stock in said Pennsylvania Sugar Company, it will, if the said Houston then desires to sell, endeavor, in so far as it can, to effect a sale of the stock of the said Houston upon the same terms and conditions as it sells its own stock.

Tenth. This agreement shall bind the parties hereto, their legal representatives, successors, and assigns.

In witness whereof the corporate party hereto has caused its common or corporate seal to be hereunto affixed, duly attested by its proper officers, and the individual party hereto has hereunto set his hand and seal, the day and year first above written.

Sealed and delivered in the presence of:

THE REAL ESTATE TRUST COMPANY OF PHILADELPHIA,

By (Sgd.) GEORGE H. EARLE, Jr.,
President.

Attest:

(Sgd.) WILLIAM R. PHILLER, *Secretary.*
(Sgd.) BENJ. F. MOORE.
(Sgd.) SAMUEL F. HOUSTON. [SEAL.]

74 *Petitioner's Exhibit No. 9*

FEBRUARY 11, 1915.

To the Board of Directors of "The Real Estate Trust Company of Philadelphia."

GENTLEMEN: The undersigned committee, which was appointed by your body to consider and report upon the so-called "Segal matters" and the relations of all parties thereto, and which committee was composed of Messrs. Converse (since deceased), Houston, Junkin, and Roberts, have had many conferences upon the subject which was referred to them, and they beg herewith to submit the results at which they have arrived and the conclusions which seem to them to be apparent therefrom. They attach hereto a reparate statement, prepared by a member of the original committee, in which the remaining members thereof entirely concur and in the course of action therein recommended as to the future concerning the treatment of the "Segal matters."

As these conclusions apparently raise new questions, which have not heretofore been discussed, concerning these "Segal matters," and, if such conclusions are correct, they become vitally important for the future treatment of the "Segal matters" and their proceeds in the affairs of the company, your committee would recommend that this report and such conclusions be referred to John G. Johnson, Esq., for his opinion as to the soundness thereof or as to any suggestions which he may have to make as to the whole situation. Manifestly, the time has arrived when some definite policy should be adopted and adhered to for the future in the treatment of
75 these assets and their proceeds. The large interest represented by the stockholding of this company in the Pennsylvania Sugar Company, and which grew out of the "Segal matters," renders it essential, in the opinion of the committee, that this whole question should be presently and finally determined.

The committee has also ascertained that apparently the provision of the plan of reorganization of September 12th, 1906, which was adopted by the stockholders, has not been complied with, where in paragraph 4, in connection with the "Segal matters," it is provided: "A schedule of such items to be filed with the commissioner of banking to prevent future controversy." This appears from the correspondence hereto attached between a member of the committee and the present commissioner of banking.

It is manifest from this correspondence also that the items mentioned in his first letter, which correspond with the items carried by the treasurer in his book in connection with the "Segal matters," constitute the details of the schedule which should have been filed, and which, in the opinion of the committee, should now be filed formally with the commissioner of banking, and filed by the gentlemen who were appointed under the agreement made in November, 1907, between the contributing directors themselves, who therein appointed Messrs. Converse, Houston, and Benson as a committee to represent the contributing directors in all matters affecting the Segal assets in so far as they related to the contributing directors' interests. This schedule should also be signed by the officers of the corporation as being the agreed upon schedule between such contributing directors and the company.

We also append hereto a copy made from the special book kept by Mr. Edward S. Buckley, jr., treasurer of the company, in connection with the Segal collaterals, which, the treasurer states, con-
76 tain all entries of all transactions concerning such securities since the reorganization of the company on November 1, 1906, and which show in detail of what such assets consisted, the amounts of cash that have been received on account of the same, both principal and income, to date, and also such securities as have been received in every instance in exchange for or in lieu of any of the original securities.

We also attach hereto a statement prepared by John A. McCarthy, Esq., trust officer of the company, on June 20th, 1912, explaining in detail the different steps which were taken and the results of the same in connection with such assets up to that date, together with a further letter from such trust officer, dated December 28th, 1914, bringing his report on the same down to the date of such letter.

We also append hereto copies of the original letter of Mr. Earle to the stockholders, dated September 12th, 1906, and of the plan of reorganization, dated October 24th, 1906.

We also append hereto a copy of the agreement made by the contributing directors, appointing the aforesaid committee to represent them in November, 1907.

Assuming that the conclusions arrived at by your committee are found to be correct, and approved by Mr. Johnson, the net result of the situation appears to be that whether the "Segal matters" are treated as having been approved by the banking commissioner and

accepted by the company as equivalent on November 1, 1906, to a total asset in hand equalling at least the sum of $775,000 for purposes of calculation in full paying the then outstanding stock issue, both common and preferred, or whether the result of the administration of the same has produced that which is equivalent to $775,000 and more in the present assets of the company, it follows that
77 at least the entire original capital of $1,500,000 has been restored; and that upon November 1st, 1906, there remained still to be realized from all of the assets appraised at that time at the sum of $1,500,000, a further sum representing the surplus carried upon the books of the company at the time of the failure of $1,500,000, before the contributing directors become entitled to any of the proceeds of the "Segal matters;" and that against such latter sum there should be credited the cash sums which have been received by the treasurer of the company as the result of the Segal assets, as shown by his accounts (a copy of which is hereto attached), aggregating a total sum of $200,362.95; and that in the future against the same sum should be credited all principal sums received by the company from the disposition of such assets and all income therefrom until the same is entirely liquidated, and from that time on the contributing directors would be entitled to the proceeds of the administration of such assets.

Should the chief Segal asset remaining, to wit: the stock of the Pennsylvania Sugar Company, be found at any given time, by reason of the success of the company, to have an actual value sufficient to more than extinguish whatever may be the remaining amount due upon such deficiency, it appears to your committee that at that time the situation is one then open to negotiation and settlement between the company and the contributing directors as to the disposition of such assets or the adjustment of the same between them and the company, and, if the sugar company is as successful as it is anticipated and hoped, the attainment of such much to be desired result apparently need not be a matter of very long time.

Respectfully submitted by

(Signed) S. F. Houston,
Frank C. Roberts,
Joseph deF. Junkin.

78 Samuel F. Houston, called as a witness on behalf of petitioner and being duly sworn, testified in part as follows:

Direct examination.

In 1906 I was a director of the Real Estate Trust Company of Philadelphia, and a member of a committee of the directors, known as the Converse committee, created by the agreement entered into by all of the subscribers of the guaranty fund. I was familiar with the steps taken to secure the appointment of George H. Earle, jr., as receiver, and the steps taken thereafter leading up to the reorganiza-

tion of the company and its reopening for business on November 1, 1906. I participated in the conferences with the receiver concerning the formulation of his plans and after the company reopened, I was a member of its board of directors. I was familiar with the formation of the plans for the guaranty fund and for the administration of the Segal assets, and had almost daily talks with the receiver and my fellow directors concerning these plans. I subscribed to the guaranty fund and in making my subscription I understood that I was to look to the administration of the Segal assets as the source from which I would receive a return on my investment. Representation and expressions of opinion were made by Mr. Earle, the receiver, to the subscribers concerning the prospect of realizing on the Segal assets. Mr. Earle was most sanguine of the Segal assets proving of sufficient value to repay every cent that was put into the guaranty fund with interest and possibly with a profit. I was familiar regarding the Segal assets. In considering their prospective value, it is necessary to fix the time in question, for we had a very different mental attitude at the time the agreement was entered
79 into. At that time we thought that the Segal assets had a very potential value. The receiver and the parties to the guaranty fund had almost daily discussions concerning the manner of working out the so-called Segal assets, and at that time I had the opportunity to form an opinion concerning the working out of the Segal assets in accordance with the plan. I reached the conclusion that the administration of the Segal assets according to the terms of the agreement as outlined by Mr. Earle would result in our getting back our contributions with interest and possibly with a profit. In 1915 a difference of opinion arose upon the proper interpretation of the original agreement. The so-called guaranty fund agreement was referred to Mr. John G. Johnson, who rendered his opinion in July 15, 1915. Following Mr. Johnson's opinion, the so-called supplemental agreement of May 5, 1916, was entered into, and I was a party to that agreement. The administration of the Segal assets thereafter by the Real Estate Trust Company was controlled by that supplemental agreement until, in the latter part of 1920, all of the parties reached an agreement that the administration had accomplished its purpose and that the assets should be distributed in kind. At the time the agreement of 1916 was entered into by me, I was of the opinion that if the sugar company was as successful as we anticipated and hoped, the much desired result that the Real Estate Trust Company would work out from the Segal assets a sum sufficient to return to the subscribers the amount of their contributions need not be a matter of very long time.

I executed the agreement of December 30, 1920, and received my proportionate share of the Pennsylvania Sugar Company stock thereunder. I personally was entitled to 222 shares. I received the stock on December 30, 1920. I took my loss in 1920 and I charged it off

at that time. With regard to Mrs. Henry, I had discussions
80 with her about the working out of the assets after she had made her subscription of $200,000 to the fund. I reported to her from time to time about the affair. I talked to her casually about things and I called to her attention important matters such as the making of the agreement of 1916. As a matter of fact, I represented her in the matter and after her subscription was made I acted for her. After I received the number of shares that the subscription in her name entitled her to, I gave her the shares which were received through me. That was in 1921. At the time that she made her subscription I told her that here were all of the securities and we believed them to have a value of considerably more than the value of the contribution.

Cross-examination:

With regard to the dealings in making the subscription, I represented Mrs. Henry at the very beginning to the extent of $200,000; that is, the subscription was made in my name for her. I continued to represent her in the matter until the agreement of December 30, 1920. In December, 1920, I received approximately 527 shares of stock in the Pennsylvania Sugar Company for myself individually, and for the different persons who helped me to contribute the $755,000. In other words I received an allotment of shares equivalent to the percentage which the $755,000 bore to the entire subscription amount. I received all of said shares at one time.

Although I expressed an opinion, during the direct examination, that the Segal matters had a value greater than the amount of the subscription, it is a matter of fact that some $5,000,000 were supposed to have been lost through the Segal matters by the Real Estate Trust Company in 1906. Certain collateral consisting of stock in
81 the Pennsylvania Sugar Refining Company had been wrongfully released and had become subject to the prior lien of another creditor.

I do not recall all of the steps in the plan for reorganization but the first step was that of offering notes of the directors to the extent of $3,000,000 to the clearing house committee in order to keep the company from failing. That plan did not go through, however; the company did fail. Subsequently, the directors reached an agreement to place $2,500,000 in cash with the company to enable it to reopen and carry on business.

There were other considerations for the directors going forward with these subscriptions. Mr. Earle, the receiver, in his letter to the stockholders, had suggested the possibility of double liability on their part with the probability of extended litigation over the matter. He had also suggested the possibility of liability on the part of the directors, although he stated to the directors frequently that in his opinion they had no personal responsibility. There was also the fact that the Real Estate Trust Company had been a going

organization since 1883 or 1885; the real question in the minds of Mr. Earle and the directors was a speedy reopening of the company. That was the prime consideration. I was one of those who offered to submit my note to the clearing house in order to avoid the appointment of a receiver and in order to continue the business of the company. After the receiver was appointed the prime consideration was the reopening for business.

At the time of my subscription to the reorganization there was no valuation made of the Segal assets, but the banking commission agreed to accept them at a value of $755,000. Mr. Johnson also said in his opinion that they were valued at or nearly $755,000. It was the acceptance of that valuation that enabled the total subscription to be limited to $2,500,000 instead of the $3,000,000 originally proposed.

82 Among the so-called Segal assets there were a whole lot of other securities besides the stock of the Pennsylvania Sugar Refining Company. We were so busy with other things that we did not have time to really find out what the values were. Mr. Earle, the receiver, attempted to liquidate those other securities and that liquidating was done very shortly after the company reopened, or even during the receivership, I have forgotten which. I should say that the securities other than the stock of the Pennsylvania Sugar Refining Company had very largely been administered in 1911. I would not say all, but perhaps so.

In February, 1915, our viewpoint was optimistic. The stock of the Pennsylvania Sugar Company was the main asset; as far as I recall it was practically the only one. And the outlook for the Pennsylvania Sugar Company, at that time, was exceptionally good because of conditions resulting from the war and the tariff.

JOHN A. MCCARTHY, called as a witness on behalf of the petitioner, having been duly sworn, testified in part as follows:

I am a member of the bar of Philadelphia and was in practice in 1906 and was of counsel for George H. Earle, jr., as receiver for the Real Estate Trust Company. I became and still hold the office of trust officer of that company. I was familiar with the plans for reorganization and attended meetings between the receiver and the directors. I was familiar with the Segal assets and the terms of the plan for reorganization which included the subscriptions to the guaranty fund. Prior to and at the time the subscriptions to the guaranty fund were made I was present when Mr. Earle

83 discussed the potential values of the Segal assets and I personally formed my own opinion concerning them. I was of the opinion in 1906 that there was a very reasonable expectation that the Segal assets, if properly worked out and properly handled in these cases where liquidation was necessary, would more than equal the amount of the contributions of the directors. I thought that everyone who contributed to the fund, and had so stated to

them, would receive back their money in full and subject to a reasonable business risk, there would be a substantial profit. My statement was made at a meeting when the receiver and the members of the board, including Mr. Houston, were assembled. I was of counsel in the litigation against the American Sugar Refining Company and I am familiar with that litigation and the settlement which resulted from it out of which the stocks and bonds of the Pennsylvania Sugar Refining Company were received. That suit was under the Sherman Act and it was compromised in January, 1910.

I was secretary and treasurer of the Pennsylvania Sugar Company and I was also trust officer of the Real Estate Trust Company. I attended to the duties of putting through the liquidating agreement of December 30, 1920. That agreement was signed on December 30, 1920, by Mr. Houston. The stock of William W. Porter was delivered through me on January 23, 1921, as appears from the stock registry transfer book of the Pennsylvania Sugar Company. Mr. Porter received fifty-four shares of the stock which was worth $150 per share.

With regard to the liquidation of the Segal assets there were a great many items back in 1906 and I should say that a great many of them had been cleared up by 1911. The reorganization of the Pennsylvania Sugar Refining Company was effected on January 22, 1912. I think that by that time there were only about two securities which remained unliquidated. There may have been one or two more minor ones, I am not sure. Outside of the sugar company stock the great bulk of the matters had been cleared up prior to 1912.

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Mrs. Sallie Houston Henry, called as a witness on behalf of petitioner, and having been duly sworn, testified in part as follows:

Direct examination:

My name is Sallie Houston Henry of Chestnut Hill, Pennsylvania, and I am the petitioner in the matter pending before the United States Board of Tax Appeals. I was one of those who contributed to the so-called guaranty fund in the reorganization of the Real Estate Trust Company of Philadelphia. I was not a director of that company but I was a stockholder holding 1,071 shares. I knew of the plans for the reorganization from my talks with my brother, Samuel F. Houston, who was a director of the company, and from the letters received from George H. Earle, jr., receiver. It was my understanding from what Mr. Houston said, with Mr. Earle's authority, that the money I put in would be returned, and if there was any money over and above the promised subscription, that that would be divided among the people who had subscribed to this fund. Following the time of my subscription and down to 1920 I do not think that anyone ever told me that I would not receive my subscription back.

In 1920 I consented to my brother entering into an agreement with the Real Estate Trust Company on my behalf, as well as on his own behalf, to cancel the agreement in relation to the trust fund or the guaranty fund and make a distribution of the stock
85 of the Pennsylvania Sugar Company. In 1921 I received through my brother my number of shares of stock of the Pennsylvania Sugar Company. I did not receive anything else other than those shares as a result of my contribution of $200,000 in 1906. Mr. Houston acted for me entirely throughout the transaction. I never appeared at any of the meetings or in any personal way at all.

Cross-examination:

I do not know how it happened that my brother took up the matter of reorganization with me. I was interested in the Real Estate Trust Company and it was in great straits, and naturally we subscribed the money to put it on its feet again. What the trust company needed was cash to carry on. At the time this was taken up I talked regarding the matter with Mr. Bayard Henry and Mr. Houston. I did not know until the other day that Mr. Houston subscribed $755,000 because, as I tell you, the thing was in this very disagreeable position, and from the point of view of a director, he felt that it was his duty to help to collect the cash. As I tell you, what they needed was cash to carry on, and it was his point of view to get the cash together to help out and then with Mr. Earle's ideas, they thought they would be able, as they were able to put the thing on its feet again. It was what you might call a business enterprise so that the Real Estate Trust Company would not be compelled to liquidate, but would open its doors and carry on business. I do not know whether Mr. Houston said anything at the time with reference to the possible liability of the directors. Of course they felt that they had a moral liability, but I never felt they had any other, and I do not know that Mr. Houston said so.

Mr. Earle must have sent me a copy of the plans for reorganization as I was a stockholder and also a depositor. I really do
86 not know whether Mr. Houston asked me to become a subscriber or whether I volunteered. However, I made my payment of $200,000 direct to Mr. Houston and he in turn turned that in to the guaranty fund. At the time I made this payment I had no written agreement with respect to my understanding. It was my understanding that Mr. Houston was to assume no personal responsibility for the repayment of the $200,000 to me, but I fully understood that the company would be able to. That is what Mr. Earle kept saying all the time, that when the company got on its feet it would be quite able to return the money that was deposited for this emergency.

It was my understanding that whatever return was made to me of the $200,000 which I advanced through Mr. Houston to this guaranty

fund was to come from the liquidation and working out of the Segal assets. Mr. Houston represented me in so far as my share of the contribution was concerned. The only notice that I had of the supplemental agreement was through him.

Q. At the time this guarantee fund was made up, the matter was considered to a great extent a question of honor, was it not?

A. Well, it was, yes. Of course, it was honor, but, at the same time, it was a business risk. All business is a matter of honor. If you don't have honor, you can't have honesty or anything else, as far as that is concerned. There is no question of that.

The reorganization was not concluded for a great many years after the original trouble. I was not aware of any negotiations prior to the time that the agreement of 1920 was entered into. As I said, as far as I was concerned it was all in my brother's hands. I had loaned the money for this business venture, and when these details came up he attended to them. I suppose he told me about them afterwards, but I don't believe he told me about them before
87 they happened. I don't think it was at all likely he did. I haven't the faintest idea when I first learned of the final agreement of December 30, 1920. As I say, I did not attend to the details of this business. It was in my brother's hands and he was attending to it for me. I do not consider myself a business person. He had done that all the way through from the very beginning. Whatever my brother had done in that connection was acceptable to me. It was entirely in his hands. I don't consider myself a business person. I don't think I have a business head and I don't interfere with things of that kind.

(Sgd.) WILLIAM C. ALEXANDER, JR.,
Counsel for Petitioner.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

Approved this day of , 1929.

_____, _____,
Member, United States Board of Tax Appeals.

Now, July 15, 1929, the foregoing statement of evidence certified from the record as a true copy.

[SEAL] (Sgd.) B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

88 Before United States Board of Tax Appeals

Præcipe for transcript of record

Filed April 15, 1929

SIR: Prepare and certify transcript of record sur appeal in the above-entitled case to United States Circuit Court of Appeals for

the Third Circuit, incorporating in said transcript of record the following:

(1) Docket entries of proceedings before the board.
(2) Pleadings before the board.
(3) Findings of fact, opinion and decision of the board.
(4) Petition for review.
(5) The statement of evidence, including in full reporter's minutes, pages 1 to 104 inclusive.

WILLIAM C. ALEXANDER, JR.,
Attorney for Petitioners.

Now July 15, 1929, the foregoing precipe certified from the record as a true copy.

[SEAL.] (Sgd.) B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

89 In United States Circuit Court of Appeals for the Third Circuit

No. 4224. October term, 1929

WM. HOBART PORTER, ET AL., EXRS., EST. W. W. PORTER, DEC'D., PETITIONER

VS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order substituting party respondent

Filed Nov. 15, 1929

In conformity with the stipulation of counsel filed herein, it is ordered that Robert H. Lucas, Commissioner of Internal Revenue, be substituted as respondent in the above entitled cause, for David H. Blair, former commissioner, and that the said cause be continued and maintained against the said Robert H. Lucas, Commissioner of Internal Revenue, as aforesaid.

Philadelphia, November 15, 1929.

Per curiam:

BUFFINGTON, *Circuit Judge.*

[File endorsement omitted.]

90 [Clerk's certificate to foregoing paper omitted in printing.]

91 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order assigning judge

Filed Jan. 13, 1930

And now, to wit: this 13th day of January, A. D. 1930, it is ordered that Hon. Albert W. Johnson, district judge, for the Middle District of Pennsylvania be, and he is hereby assigned to sit in above case in order to make a full court.

Per curiam:

BUFFINGTON, *Circuit judge.*

[File endorsement omitted.]

92 [Minute entry of argument and submission Jan. 13, 1930, omitted in printing.]

93 In United States Circuit Court of Appeals for the Third Circuit

No. 4224. October term, 1929

WILLIAM HOBART PORTER AND ANDREW W. PORTER, EXECUTORS OF the Estate of William W. Porter, Deceased, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review from the United States Board of Tax Appeals

Opinion

Before WOOLLEY and DAVIS, Circuit Judges, and JOHNSON, District Judge

Filed March 18, 1930

WOOLLEY, Circuit Judge:

This case differs from that of Houston vs. Commissioner (— Fed. (2d) —) mainly in procedure and in one issue of law arising from the procedure.

William W. Porter was one of the eleven directors of the Real Estate Trust Company of Philadelphia who, on its failure in 1906, raised among themselves a fund of $2,505,000 to restore its solvency. His contribution was $75,000. The fund was to be used for the purpose and be returned to the contributors as set forth at length in Houston vs. Commissioner, supra. The trust company closed out the matter in 1920 and in January, 1921, William W. Porter received, as his part of the final settlement, 54 shares of the Pennsyl-

vania Sugar Refining Company—the equivalent of money—of an agreed value of $150 per share.

Reckoned on cost at $75,000 in 1906 and a return of $8,100 in 1921, he sustained a loss of $66,900. He did not deduct the loss in his income tax return for 1921 but paid the tax under protest and filed a claim for its refund, which, on August 21, 1923, the commissioner allowed. On February 23, 1926, however, the commissioner disallowed as a deduction the loss previously allowed, and determined against the taxpayer a deficiency tax for the year 1921 in the sum of $7,268.60, assigning the following reason:

"In a recent decision made by the Solicitor of Internal Revenue, with respect to the Real Estate Trust Company transaction, it is held that no deductible loss was incurred by any of the directors of such company, and the former ruling in your favor is revoked."

From this belated determination of a deficiency tax, William W. Porter appealed to the United States Board of Tax Appeals which sustained the commissioner. The case comes here for review on the petition of William W. Porter's executors, eight years after payment of the tax under protest, seven years after a claim for its refund had been allowed, four years after the commissioner reversed his decision and disallowed the deduction, and two years after the taxpayer's death, a situation which, we venture to say, justifies our comment in McIlhenny vs. Commissioner. (— Fed. (2d) —.)

There are really only two questions or groups of questions involved in this case. The first is the same group of questions raised and decided in Houston vs. Commissioner; the second is:

94 Where a taxpayer has paid a tax, and the Commissioner of Internal Revenue has allowed a claim for its refund, may the commissioner on the same facts change his decision and determine a deficiency because of a different opinion as to the legal significance of the facts?

The decision in Houston vs. Commissioner rules the first questions in favor of the petitioners and the decision in McIlhenny vs. Commissioner rules the second question against them.

The order of redetermination by the United States Board of Tax Appeals is reversed, the additional tax determined by the commissioner set aside and his action allowing a refund of the tax approved.

A true copy. Teste:

_____,

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

95 In United States Circuit Court of Appeals for the Third Circuit

No. 4224 (List No. 128). October term, 1929

W. H. PORTER, ET AL., EXECUTORS W. W. PORTER, DEC'D., PETITIONERS

VS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

Filed Mar. 18, 1930

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby reversed, with the direction to the said Board of T. Appeals to set aside the additional tax determined by the commissioner and to approve the said commissioner's action allowing a refund of the tax.

Philadelphia, March 18, 1930.

VICTOR B. WOOLLEY,
Circuit Judge.

[File endorsement omitted.]

96 [Clerk's certificate to foregoing transcript omitted in printing.]

97 Supreme Court of the United States

Order allowing certiorari

Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 35125. U. S. Circuit Court of Appeals, Third Circuit. Term No. 203. Robert H. Lucas, Commissioner of Internal Revenue, petitioner, vs. William Hobart Porter and Andrew W. Porter, executors of the estate of William W. Porter, deceased. Petition for a writ of certiorari and exhibit thereto. Filed June 18, 1930. File No. 35125.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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FILE COPY

No. 203

In the Supreme Court of the United States

OCTOBER TERM, 1930

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM HOBART PORTER AND ANDREW W. PORTER, EXECUTORS OF THE ESTATE OF WILLIAM W. PORTER, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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CITATIONS

Cases:	
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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. —

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

WILLIAM HOBART PORTER AND ANDREW W. PORTER, Executors of the Estate of William W. Porter, Deceased

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled cause on March 18, 1930 (R. 91), reversing the decision of the United States Board of Tax Appeals (R. 23–26).

STATEMENT

This case reached the Circuit Court of Appeals for the Third Circuit on the petition of William Hobart Porter and Andrew W. Porter, Executors of the Estate of William W. Porter, deceased, respondents herein, for a review of the decision of the Board of Tax Appeals determining a deficiency in income tax of William W. Porter for the calendar year 1921.

The facts as found by the Board of Tax Appeals are as follows (R. 17–23):

William W. Porter was a stockholder and director in the Real Estate Trust Company of Philadelphia, a banking institution. The Trust Company closed its doors in the year 1906, and on August 28th of that year George H. Earle, Jr., was appointed receiver. The financial embarrassment of the Trust Company was brought about by the improper conduct of its affairs by its president, Frank Hipple. Hipple loaned excessive amounts to one Adolph Segal, and took therefor collateral which could not be easily liquidated, but which was not without value.

The receiver for the Trust Company evolved a plan for reorganization which included as one of its provisions the creation of a fund of $2,500,000 from subscriptions by directors of the company. The company was to be given the $2,500,000 outright, and the subscribers were to be reimbursed, if at all, by all of the excess over $3,000,000 which might be realized from the "Segal Matters." This plan of

reorganization became effective, and the subscribers to the $2,500,000 fund made their subscriptions with the understanding that if, from the administration of the "Segal Matters," $3,000,000 should be realized the subscribers were to receive any excess over this amount which might be realized from the same. William W. Porter contributed $75,000 to the fund. No restrictions or time limits were placed upon the Real Estate Trust Company in regard to its administration and final disposition of the assets available to the Trust Company in the "Segal Matters."

The Trust Company resumed business on November 1, 1906, and thereafter and until December 30, 1920, the "Segal Matters" were administered exclusively by it under the direction of George H. Earle, Jr., formerly receiver and thereafter president of the company.

At the time the subscriptions to the guaranty fund were made, a suit against the American Sugar Refining Company under the Sherman Anti-Trust Act was contemplated on behalf of the Pennsylvania Sugar Refining Company, and the value of the "Segal Matters" depended to some extent upon the successful prosecution of such a suit. Suits were brought for $10,000,000, and in January, 1910, the litigation was compromised upon the delivery to the Trust Company, by the American Sugar Refining Company, of certain bonds wrongfully withdrawn from the Trust Company, among which were bonds of the Pennsylvania Sugar Refining

Company. The Trust Company afterwards converted the latter bonds, through a foreclosure, into 7,268 shares of stock in a reorganized company thereafter called the Pennsylvania Sugar Company. This was on or before January 22, 1912.

Some question arose between the parties in regard to their rights under the subscription agreement, including the right to interest, and on May 5, 1916, a supplemental agreement was entered into. At this time, and for some time prior thereto, the principal unliquidated asset of the original "Segal Matters" was the 7,268 shares of stock in the Pennsylvania Sugar Company, and under the supplemental agreement it was provided that when this stock was disposed of the contributors to the guaranty fund should receive one-fourth of the proceeds.

In the latter part of 1920 the parties concerned, after full investigation, concluded that the liquidation agreement had rendered its maximum of service, and that the remaining Segal assets would not have any greater value during a substantial period of time in the future than they then had. Whereupon, the subscribers, either individually or by their duly constituted representatives, entered into separate agreements which as a group provided for complete liquidation of the "Segal Matters" by the Trust Company. Distribution of one-fourth of the 7,268 shares of the Pennsylvania Sugar Company stock was made to the subscribers to the fund in proportion to the amount of their subscriptions in full satisfaction and discharge of

their interest in the "Segal Matters." The subscribers never received any other return on their subscriptions.

William W. Porter entered into such an agreement and on January 23, 1921, in accordance with the terms thereof, received 54 shares of Pennsylvania Sugar Company stock.

At the time of such distribution each share of stock of the Pennsylvania Sugar Company had a fair market value of $150.

In reporting his income for the year 1921, William W. Porter deducted $66,900 as a loss computed by deducting the value of the shares he received from the amount of his subscription.

The Commissioner of Internal Revenue disallowed the deduction and found a deficiency in tax of $7,268.60. An appeal was taken to the Board of Tax Appeals. The Board sustained the action of the Commissioner, holding that the loss, if any, would be the difference between what was received in 1921 for the property right and its cost or March 1, 1913, value, whichever was lower, and that since no effort was made by the taxpayer to show the March 1, 1913, value of the right in question, no deductible loss was established. William W. Porter, having died on November 16, 1928, the respondents, as executors of the estate of the deceased, filed a petition for a review by the Circuit Court of Appeals for the Third Circuit of the decision of the Board (R. 27), and on March 18, 1930, the

Circuit Court of Appeals, relying on its previous decision in *Houston* v. *Lucas,* a petition for certiorari in which was filed by the Government on June 14, 1930 (No. 199), reversed the Board's decision, on the ground that the loss was the difference between the cost of the right in 1906, and the amount realized in 1921.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred—

1. In failing to hold that only those losses are deductible from gross income which are sustained after March 1, 1913.

2. In failing to hold that the ascertainment of the March 1, 1913, value was necessary for the purpose of apportioning the total loss between the periods before and after March 1, 1913.

3. In holding that the deductible loss was the difference between the cost of the taxpayer's property right in 1906 and the amount realized in 1921, there being no evidence that any portion of said loss had been sustained subsequent to March 1, 1913.

4. In failing to hold that the burden was upon the taxpayer to prove the March 1, 1913, value of his property right to support a claim for a deductible loss.

5. In holding that under the facts in this case the taxpayer was relieved of the necessity of establishing the March 1, 1913, value of his property right.

REASONS FOR GRANTING THE WRIT

1. The decision in the present case is in conflict with the decisions of this Court.

In *United States* v. *Flannery,* 268 U. S. 98, this Court held that March 1, 1913, is a controlling date because the statutory provisions regarding value on that date are a limitation upon the amount of the actual gain or loss that would otherwise have been taxable or deductible. In this case the lower court imposed no such limitation. It allowed all losses subsequent to 1906 to be deducted even though there was evidence to indicate that a substantial part of the loss had been sustained prior to 1913. (R. 82.)

In *Lucas* v. *Alexander,* 279 U. S. 573, this Court held that the purpose of ascertaining the March 1, 1913, value of property is to apportion the total gain which has accrued between the periods before and after March 1, 1913. Under the *Flannery* decision the same rule is applicable to losses.

In *Reinecke* v. *Spalding,* 280 U. S. 227, this Court held that the burden was upon the taxpayer to establish his right to a deduction disallowed by the Commissioner of Internal Revenue. The taxpayer presented no evidence of the value of his right on March 1, 1913.

2. The decision in the present case is in conflict with the decisions of the Court of Appeals of the District of Columbia in *Ayer* v. *Blair,* 26 F. (2d) 547, and the Circuit Court of Appeals for the Eighth Circuit in *Holmquist* v. *Blair,* 35 F. (2d) 10.

In *Ayer* v. *Blair, supra,* a taxpayer advanced moneys to an insolvent corporation in 1908, and obtained a partial recoupment in 1920. The court held that the only loss deduction that the taxpayer could have in 1920 was the difference between the 1913 and the 1920 values of his claim to recoupment.

In *Holmquist* v. *Blair, supra,* the court held that the March 1, 1913, value of the taxpayer's property interests was a matter of evidentiary proof, and that, to show error on the part of the Commissioner of Internal Revenue, value on that date must be proved.

3. The question is of present importance in the administration of the tax laws. The Revenue Act of 1924 and subsequent Acts provide a different basis for measuring gains or losses on the sale or other disposition of property acquired prior to March 1, 1913, but the necessity of establishing value as of that date has not been removed.

Wherefore, it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.

JUNE, 1930.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals (R. 90) is reported in 39 F. (2d) 360. The findings of fact and the opinion of the Board of Tax Appeals (R. 17–26) are reported in 13 B. T. A. 279.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 18, 1930. (R. 91.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Was it incumbent upon the taxpayer to establish the March 1, 1913, value of his property right acquired prior to that date, to support a claim for a deductible loss on the disposition of such property in 1921?

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227, 229, 230, 239, 240:

> SEC. 214. (a) That in computing net income there shall be allowed as deductions:
>
> * * * * * *
>
> (5) Losses sustained during the taxable year and not compensated for by insurance

or otherwise, if incurred in any transaction entered into for profit * * *.

SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; * * *.

(b) The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, shall be the same as that provided by subdivision (a); but—

* * * * * *

(2) If its fair market price or value as of March 1, 1913, is lower than such basis, the deductible loss is the excess of the fair market price or value as of March 1, 1913, over the amount realized therefor; * * *

(3) If the amount realized therefor is more than such basis but not more than its fair market price or value as of March 1, 1913, or less than such basis but not less than such fair market price or value, no gain shall be included in and no loss deducted from the gross income.

Treasury Department Regulations 62 (1922 edition) relating to the Revenue Act of 1921:

ART. 1561. *Basis for determining gain or loss from sale.*—For the purpose of ascertaining the gain or loss from the sale or exchange of property, the basis is the cost of such property, or in the case of property

which should be included in the inventory, its latest inventory value. But in the case of property acquired before March 1, 1913, when its fair market value as of that date is in excess of its cost, the gain to be included in gross income is the excess of the amount realized therefor over such fair market value. Also in the case of property acquired before March 1, 1913, when its fair market value as of that date is lower than its cost, the deductible loss is the excess of such fair market value over the amount realized therefor. No gain or loss is recognized in the case of property sold or exchanged (a) at more than cost but at less than its fair market value as of March 1, 1913, or (b) at less than cost but at more than its fair market value as of March 1, 1913. * * * What the fair market value of property was on March 1, 1913, is a question of fact to be established by any evidence which will reasonably and adequately make it appear. * * *

STATEMENT

The facts are stated in the petition for certiorari.

ARGUMENT

The question presented is the same as that in *Robert H. Lucas, Commissioner of Internal Revenue, Petitioner,* v. *Samuel F. Houston,* No. 199, October Term, 1930, now pending in this Court on a petition for writ of certiorari filed June 14, 1930. The argument in the brief in support of that petition is here incorporated by reference.

CONCLUSION

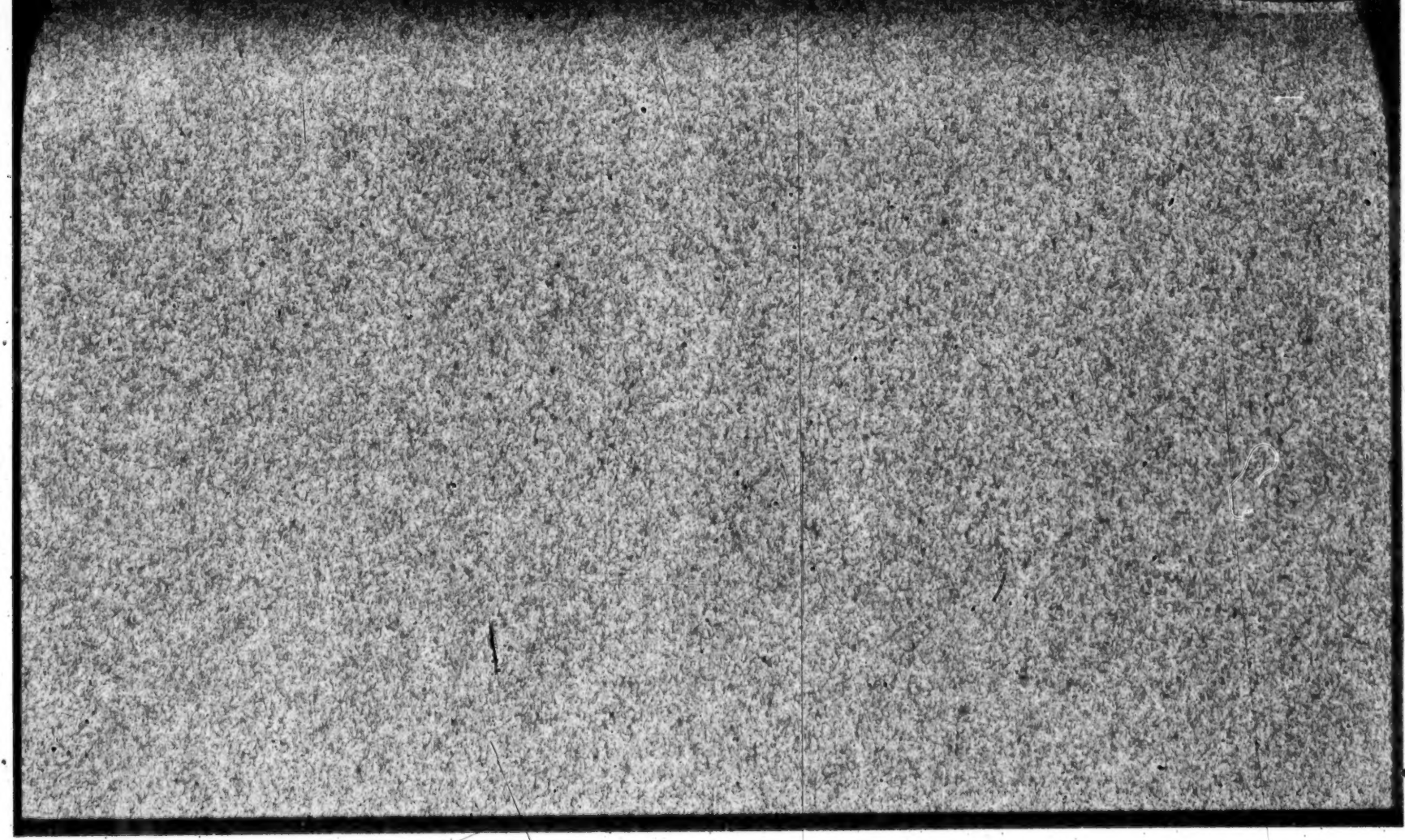
Because of the importance of the question involved in the administration of the tax laws and the conflict of decisions thereon, it is submitted that the petition should be granted.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
J. LOUIS MONARCH,
JOHN G. REMEY,
Special Assistants to the Attorney General.
W. MARVIN SMITH,
Attorney.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.
ALLIN H. PIERCE,
Special Attorney,
Bureau of Internal Revenue.

JUNE, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930



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FEB 25 1931
CHARLES ELMORE CROP
CLERK

Nos. 202 and 203

In the Supreme Court of the United States

OCTOBER TERM, 1930

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SALLIE H. HENRY

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM HOBART PORTER AND ANDREW W. PORTER, EXECUTORS OF THE ESTATE OF WILLIAM W. PORTER, DECEASED

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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CITATIONS

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Statutes:	
Revenue act, 1921, c. 136, 42 Stat. 227, 229–230, 239–240—	
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Treasury Regulations 62 (1922 ed.), promulgated February 15, 1922, under the revenue act of 1921, Art. 1561	4–6

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 202

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

SALLIE H. HENRY

No. 203

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

WILLIAM HOBART PORTER AND ANDREW W. PORTER, Executors of the Estate of William W. Porter, deceased

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

No. 202

The opinion of the Circuit Court of Appeals (R. 56) is reported in 39 F. (2d) 358. The opin-

ion of the Board of Tax Appeals (R. 15) is reported in 13 B. T. A. 279.

No. 203

The opinion of the Circuit Court of Appeals (R. 55) is reported in 39 F. (2d) 360. The opinion of the Board of Tax Appeals (R. 14) is reported in 13 B. T. A. 279.

JURISDICTION

No. 202

The judgment of the Circuit Court of Appeals was entered March 17, 1930. (R. 58.) The petition for a writ of certiorari was filed in this Court on June 17, 1930. (R. 59.) Certiorari was granted October 13, 1930.

No. 203

The judgment of the Circuit Court of Appeals was entered March 18, 1930. (R. 57.) The petition for a writ of certiorari was filed in this Court on June 18, 1930. (R. 57.) Certiorari was granted October 13, 1930.

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Was it incumbent upon the respondent to establish the March 1, 1913, value of a property right acquired prior to that date to support a claim for

a deductible loss on the disposition of such property in 1921?[1]

STATUTES AND REGULATIONS INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 229–230, 239–240, provided in part:

> SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property • • •
>
> (b) The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, shall be the same as that provided by subdivision (a); but—
>
> • • • • •
>
> (2) If its fair maket price or value as of March 1, 1913, is lower than such basis, the deductible loss is the excess of the fair market price or value as of March 1, 1913, over the amount realized therefor. • • •
>
> (3) If the amount realized therefor is more than such basis but not more than its fair market price or value as of March 1,

[1] In the *Henry* case, No. 202, a further question was raised in the court below as to the sufficiency of the evidence to support the Board's conclusion that Samuel F. Houston acted as the respondent's agent in making final settlement with the trust company. As this question was not of public importance, consideration of it was not requested in the petition for certiorari.

1913, or less than such basis but not less than such fair market price or value, no gain shall be included in and no loss deducted from the gross income.

SEC. 214. (a) That in computing net income there shall be allowed as deductions:

* * * * *

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit. * * *

Treasury Regulations 62 (1922 edition), promulgated February 15, 1922, under the Revenue Act of 1921:

ART. 1561. *Basis for determining gain or loss from sale.*—For the purpose of ascertaining the gain or loss from the sale or exchange of property, the basis is the cost of such property, or in the case of property which should be included in the inventory, its latest inventory value. But in the case of property acquired before March 1, 1913, when its fair market value as of that date is in excess of its cost, the gain to be included in gross income is the excess of the amount realized therefor over such fair market value. Also in the case of property acquired before March 1, 1913, when its fair market value as of that date is lower than its cost, the deductible loss is the excess of such fair market value over the amount realized therefor. No gain or loss is recognized in the case of property sold or exchanged (a) at more than cost

but at less than its fair market value as of March 1, 1913, or (b) at less than cost but at more than its fair market value as of March 1, 1913. * * * What the fair market value of property was on March 1, 1913, is a question of fact to be established by any evidence which will reasonably and adequately make it appear. * * *

* * * * *

Illustrations of the computation of gain or loss from the sale or exchange of property acquired prior to March 1, 1913.—To avoid complexity no adjustment has been made in these examples for depreciation or depletion.

* * * * *

In the case of property acquired before March 1, 1913, when its fair market value as of that date is lower than its cost, the deductible loss is the excess of such fair market value over the amount realized therefor.

Cost	Fair market value Mar. 1, 1913	Sale price	Deductible loss
$10,000	$5,000	$3,000	$2,000. Excess of fair market value over amount realized. Loss attributable to the period prior to Mar. 1, 1913, not deductible.

* * * * *

No gain or loss is recognized in the case of property acquired before March 1, 1913, and sold or disposed of at less than cost but at more than its fair market value as of that date.

Cost	Fair market value Mar. 1, 1913	Sale price	
$10,000	$3,000	$5,000	No taxable gain or deductible loss. Reason: A loss on whole transaction, which loss is attributable to period prior to Mar. 1, 1913.

STATEMENT

The facts in these cases are identical with those in *David Burnet, Commissioner of Internal Revenue, Petitioner,* v. *Samuel F. Houston,* No. 199, October Term, 1930, now pending in this Court, except that the tax year here involved is 1921 and as to the following matters of detail:

No. 202

The respondent advanced $200,000 to the Real Estate Trust Co. in 1906, through her brother, Samuel F. Houston. (R. 12.) She received 158.61 shares of Pennsylvania Sugar Company stock in 1921. (R. 14.) The amount of loss which she deducted, but which the Commissioner of Internal Revenue disallowed was $176,840.28. (R. 7.) The amount of the tax deficiency involved is $100,870.29. (R. 10.)

No. 203

The decedent, William W. Porter, advanced $75,000 to the Real Estate Trust Co. in 1906. (R. 11.) He received 54 shares of the Pennsylvania Sugar Company stock in 1921. (R. 18.) The amount of loss which he deducted, but which the Commissioner of Internal Revenue disallowed, was

$66,900. (R. 14.) The amount of the tax deficiency involved is $7,268.60. (R. 10.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred—

1. In failing to hold that only those losses are deductible from gross income which are sustained after March 1, 1913.

2. In failing to hold that the ascertainment of the March 1, 1913, value was necessary for the purpose of apportioning the total loss between the periods before and after March 1, 1913.

3. In holding that the deductible loss was the difference between the cost of the right in 1906 and the amount subsequently realized, there being no evidence that any portion of said loss had been sustained subsequent to March 1, 1913.

4. In failing to hold that the burden was upon the respondent to prove the March 1, 1913, value of her property right to support a claim for a deductible loss.

5. In holding that under the facts in this case the respondent was relieved of the necessity of establishing the March 1, 1913, value of her property right.

ARGUMENT

The question presented in these cases is the same as that in *David Burnet, Commissioner of Internal Revenue, Petitioner* v. *Samuel F. Houston*, No. 199, October Term, 1930, now pending in this Court on a writ of certiorari to the Circuit Court of Appeals

for the Third Circuit. The question in the instant cases arises under Section 202 of the Revenue Act of 1921 (*supra*, pp. 3–4), which is even more explicit than the corresponding provision in the 1918 Act involved in the *Houston case*. See also the examples given in Article 1561 of Regulations 62 (*supra*, pp. 4–6), which are directly applicable to the situation here involved.

CONCLUSION

For the reasons urged in the *Houston case*, the decisions of the Circuit Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted.

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FEBRUARY, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

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No. 203 October Term, 1930.

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT H. LUCAS, Commissioner of Internal Revenue,
Petitioner,

vs.

WILLIAM HOBART PORTER and ANDREW W. PORTER, Executors of the Estate of William W. Porter, Deceased.

IN RE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR WILLIAM HOBART PORTER AND ANDREW W. PORTER, EXECUTORS OF THE ESTATE OF WILLIAM W. PORTER, DECEASED, Respondents.

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IN THE

Supreme Court of the United States

No. 203. October Term, 1930.

ROBERT H. LUCAS, Commissioner of Internal Revenue,
Petitioner,

vs.

WILLIAM HOBART PORTER and ANDREW W. PORTER, Executors of the Estate of William W. Porter, Deceased.

IN RE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

STATEMENT OF FACTS.

The statement of facts in the petition for the Government is somewhat incomplete, and reference is here made to the very excellent and accurate statement of the salient facts by Judge Wooley in the two opinions filed by him for the Circuit Court of Appeals in the case of Samuel F. Houston, No. 199, and in the instant case.

William W. Porter did not deduct the loss at the time of filing his return, but paid the tax under protest, and

filed a claim for refunding, which claim was allowed by letter of the Commissioner of Internal Revenue, enclosing a copy of the opinion of Nelson T. Hartson, Solicitor of Internal Revenue, dated August 21, 1923. (Record, page 11.)

Subsequently, on February 3, 1926, two and a half years later, the Commissioner revoked his ruling, and redetermined the deficiency of tax previously allowed. (Record, page 9.) Thus, as pointed out in the opinion of the Circuit Court of Appeals: "The case comes here for review on the petition of William W. Porter's executors, eight years after payment of the tax under protest, seven years after a claim for its refund had been allowed, four years after the Commissioner reversed his decision and disallowed the deduction, and two years after the taxpayer's death." (Record, pages 90-91.)

ARGUMENT.

Notwithstanding the assertions to the contrary in the Government's Brief, these respondents earnestly contend that the only questions involved in this appeal deal with the application of settled legal principles to the extraordinary and unique transactions to which respondent's decedent was a party. No conflict will be found in matters of law or statutory construction between the decision of the Circuit Court of Appeals in this case, and any of the decisions of this Court or of any Circuit Court of Appeals cited in the Government's Brief. The matters in controversy relate to the application of these undisputed principles to the peculiar facts of this case.

The transactions involving this taxpayer were without precedent, and it is safe to say will establish no precedent for future decisions. The guarantee fund, in which this taxpayer had a proportionate interest, was established in

1906, and was liquidated in 1921. It had neither market value nor means of determining market value. The only available evidence of value on March 1, 1913, was supplied by the testimony of Samuel F. Houston, then Vice President and now President of the Trust Company which was the administrator of the subject matters concerned. Mr. Houston stated that as late as 1916, he was of opinion that the Trust Company "would work out from the Segal assets a sum sufficient to return to their subscribers the amount of their contributions." (Record, page 79.) This evidence is ignored and stands uncontradicted by the Government. Yet it satisfies the rule enunciated by this court in Reinecke vs. Spalding, 280 U. S. 227, that "Under the statute it became necessary for respondent to establish the fair market value of her interest in the mines on March 1, 1913, or at least that such value was not below what she claimed it was."

The same cases cited in the Government's Brief were forcibly pressed upon the consideration of the Circuit Court of Appeals by counsel for the Government, and their authority was not disputed. This is clearly stated in the opinion of that court, which said:

> "The petitioner does not question the law of those cases which is in effect that a loss in an ordinary transaction relating to property owned outright by the taxpayer and entered into before March 1, 1913, is determined by adopting either the value as of that date or the cost at the earlier date, whichever is lower, as a basis, but he maintains that all those cases deal with property having a readily ascertainable value such as real estate, instruments evidencing debt and the like, which is different from ascertaining a loss under a right of the character here involved where the result of the venture could not be known until the Segal matters had been liquidated and where, therefore, the loss

of a guarantor, or the value of his correlative right to reimbursement, is not ascertainable until the guaranty transaction is liquidated and where, until then, no ascertainable loss had occurred."

(See Record, page 99, LUCAS vs. HOUSTON, No. 199.)

Under the facts peculiar to this case, the original ruling of the Commissioner, which held that the loss admittedly suffered was properly deductible, was sustained by the subsequent ruling of the Circuit Court of Appeals. This ruling is not at variance with any principles or statutory constructions to be found in any decisions of this Court. Its result was just and equitable. A further review by this Court would serve no useful purpose, but would further delay the settlement of the estate of this deceased taxpayer.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930. No. 203.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

v.

WILLIAM HOBART PORTER and ANDREW W. PORTER, Executors of the Estate of WILLIAM W. PORTER, Deceased.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

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IN THE

Supreme Court of the United States

October Term, 1930. No. 203.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

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WILLIAM HOBART PORTER and ANDREW W. PORTER, Executors of the Estate of WILLIAM W. PORTER, Deceased.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENTS.

OPINION BELOW.

The Opinion of the Circuit Court of Appeals (R. 55) is reported in *39 F. (2d) 360.* The opinion of the Board of Tax Appeals (R. 14) is reported in *13 B. T. A. 279.*

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 18, 1930 (R. 57). The petition for writ of certiorari was filed in this Court on June 18, 1930 (R. 57). Certiorari was granted October 13, 1930.

STATEMENT.

The facts in the case are identical with those in *David Burnet, Commissioner of Internal Revenue, Petitioner, v. Samuel F. Houston, No. 199, October Term, 1930,* now pending in this Court, except that the amount paid over to the Real Estate Trust Company, in conjunction with Samuel F. Houston and others, by the decedent, William W. Porter, was $75,000 (R. 11). Judge Porter received 54 shares of Pennsylvania Sugar Company stock in 1921 (R. 13), the value of which was $150. per share, or $8,100; making a difference of $66,900. for which he claimed a loss. He did not deduct this loss at the time of filing his return, but paid the tax under protest, and filed a claim for its refunding, which was subsequently allowed by the Commissioner by letter dated August 21, 1923, and thereafter paid. Two and a half years later, the Commissioner revoked his action, and determined a deficiency on the theory that the loss so claimed was not deductible.

The amount of the tax deficiency involved is $7,268.60 (R. 10).

ARGUMENT.

The main issue involved in this case is the same as that which has been completely covered in the brief filed on behalf of the respondent in *David Burner, Commis-*

sioner of Internal Revenue, Petitioner, v. Samuel F. Houston, No. 199, October Term, 1930, now pending in this Court on a writ of certiorari to the Circuit Court of Appeals for the Third Circuit. The Court is respectfully referred to the very complete argument there presented, which will not be repeated, but merely supplemental, here.

The finding of the Board of Tax Appeals, which the petitioner seeks to sustain, is predicated on the following statement as its foundation: "In consideration of the money subscribed and paid to the so-called guarantee fund, each subscriber thereto acquired certain rights which were henceforth his property and which cost is the amount of his subscription." (Transcript of Record, page 24.) In consequence, the Board holds that the March 1, 1913, value of these "rights" becomes the basis for ascertaining gain derived, or loss sustained, under the provisions of Section 202 (a) 1 of the Revenue Acts, and the decisions of the *United States Supreme Court in Goodrich vs. Edwards, 255 U. S. 527,* and similar cases.

In this fundamental conception of the facts, as the Circuit Court of Appeals has found, the Board of Tax Appeals failed to comprehend the precise nature of the transaction. In the Findings of Fact, the fund in question is called a "guarantee fund", and the purpose of the subscriptions is stated to be "to guarantee a value of $3,000,000 for Segal collateral" (Transcript of Record, page 18). It is obvious that the rights resulting to the subscribers were not of a character such as the property right acquired by the taxpayer in *Goodrich vs. Edwards, supra,* which consisted of the outright ownership of a number of shares in a mining corporation. Similar to *Goodrich vs. Edwards,* are the other cited cases, wherein the property rights involved are all of the same nature; namely, the ownership of liquid, transferable securities. In the instant case, on the other hand, as stated in the Findings

of fact, the taxpayer did not acquire absolute title to a chose in action, but he acquired a right to receive a pro rata share in the proceeds of certain assets, uncontrolled by him, when liquidated at an indefinite time in the future, and in a certain contingency.

The taxpayer's subscription was precisely what it was called, that is, a guarantee. The responsibility of the guarantor was assured by the deposit of cash, but the event which determined his gain or loss was not expected to occur until a very long time subsequent to his subscription. It was the very kernel of the plan that the subscriber should be afforded the opportunity of realizing the value inherent in these assets, which, on account of non liquidity, were unacceptable to the banking department, and had therefore caused the closing of the doors of the trust company. Had the subscribers signed a blanket bond to guarantee the Segal assets and deposited the amount of their subscriptions with another banking institution to guarantee fulfillment of the obligation, it is submitted that the legal effect of the transaction would have been the same. The subscribers, therefore, did not acquire a property right, in the sense that the term is used by the Board, at the time of their subscriptions, but, on the contrary, engaged to guarantee a certain value at an uncertain future time, to certain specific assets of the Real Estate Trust Company, which guarantee was backed by the deposit of cash.

Viewed in this light, it is obvious that the transaction does not become closed, nor does gain or loss become determinable, until the conditions of the obligation are fulfilled, to wit: the liquidation of the Segal matters and the restoration of the capital and surplus of the Real Estate Trust Company. At no sooner date does the condition of the guaranty become determined or the amount become capable of liquidation. The petitioner does not allege that the respondents have suffered no loss,

nor does the Board of Tax Appeals hold this. The only difficulty arises as to the ascertainment of the time when the loss occurred. That time certainly, in this situation is when the transaction is completed.

For the reasons above outlined, the determination of a value as of March 1, 1913, was irrelevant. But were it otherwise, and the burden of proving it rested on the respondents, that burden has been met. There being no presumption as March 1, 1913, value, and the burden of proof resting on the taxpayer, this burden must necessarily be a light one. It is pointed out in *Lucas vs. Alexander, 279 U. S. 533,* in applying Section 202 (a) 1, with reference to an asset which had no market value on March 1, 1913, and was not assignable, that the purpose of ascertaining the value on the basic date was merely to measure the part of the total gain or loss which had arisen prior and subsequent to the basic date, and, as respects property without market value, the fair value on said date is not necessarily what might have been then realized upon it by a forced liquidation, but rather its fair accrual value.

The fact that, in 1915, the contributing directors went to John G. Johnson, Esquire, and obtained an opinion from him as to the operation of the fund, and subsequently entered into a supplemental agreement concerning it in 1916; coupled with the unqualified statement of Mr. Houston to the effect that in 1916, it was his opinion that, assuming the anticipated success of the Sugar Company, the Segal assets would work out a fund sufficient to return to the subscribers the amounts of their contributions; clearly indicates that the admitted loss realized in 1921 must have occurred between 1916 and 1921. In the absence of other evidence, this would amply support such a finding, and would satisfy the burden of proof, if it rested on the respondent.

Under the issue as here raised, however, it is earnestly contended that the burden of proof rested on the Commissioner. Unlike Samuel F. Houston, Sallie H. Henry, and other taxpayers involved in the transactions here under consideration. William W. Porter paid his tax for the year 1921 under protest, and filed a claim for refund based upon the loss herein in controversy. After a thorough examination, this claim was allowed by the Commissioner of Internal Revenue, petitioner herein, who subsequently refunded the tax paid, in the year 1923. In 1926, the petitioner sent a deficiency letter to the effect that the Solicitor had changed his ruling, and that the loss was improperly allowed. Then William W. Porter died on November 16, 1928.

A clearer case of the misuse of discretionary powers upon the Commissioner could hardly be found. Judge Porter honestly and fairly paid the tax, and assumed the burden of its recovery. Nearly three years after he had successfully discharged this burden, the Commissioner determined a deficiency. Now, after the death of the taxpayer, his executors are obliged to contest the liability. The Circuit Court of Appeals held that such procedure on the Commissioner's part is justified under the law. (*See opinion of Woolley, J., 39 F. (2d) 360.*) It is submitted, however, that good faith requires that repose from tax should occur at a reasonable date in the absence of some compelling cause to the contrary, and that the estate of this taxpayer should not be required to again bear the burden of proof in the case, but that the burden of proof should now shift to the Commissioner, to establish his former error and justify his new position.

No fraud, or mistake, or additional fact, entered into the redetermination. What was said in the opinion of Lansdon (dissenting on another point) in the case of *James Couzens vs. Commissioner of Internal Revenue, 11*

B. T. A. 1040, involving the value of the Ford Motor Company stock, may be repeated here with even greater force, namely, "I cannot subscribe to the theory that moral considerations are not within the domain of the judgment of this Board and of all government agencies * * *. There was an understanding, to which the government was a party, that the valuation made by Roper should be the basis of a tax to be paid to the government. The parties complied with the terms of that understanding. I believe that the public interest requires that the government stand by its valuation. * * * I * * * am convinced that our decision here will be more consonant with just conceptions of public policy if it recognizes the moral obligation of the Treasury to accept as conclusive the acts of its agents when it is established, a in this proceeding, there is neither fraud nor gross error, either in the method employed or the results reached." See also the opinion of Morris, J., in *McIlhenny, et al., v. Commissioner of Internal Revenue, 39 F. (2d) 356.*

In *Anderson v. United States, 269 U. S. 422*, the rule was established, which has since been re-iterated and consistently followed, that "Since the suit was one to recover a tax erroneously exacted, the burden was on the petitioners, appellees here, to prove the facts establishing the invalidity of the tax." This burden Judge Porter assumed and completely discharged in his lifetime. The resulting determination in his favor was a judicial finding, which, except for the peculiar provisions of the Statute here involved, would be conclusive upon both parties, as in the case of any final judgment of a competent court. If the Commissioner, as the representative of the government, is to be accorded the right to revoke and annul his own determination nearly three years later, and to claim back from the taxpayer's executors the very moneys which he repaid to the taxpayer on his successful establishment

of his claim of refund, then the Commissioner should be required to prove his claim. The taxpayer having once thus discharged his burden, it is respectfully submitted that it is contrary to reason and equity that he should be called upon to discharge it again as a pre-requisite to the retention of the money so refunded to him. On the contrary, the positions of the parties are now reversed, and in the absence of sufficient evidence to support a contrary finding, the executors of the estate of this taxpayer are entitled to the protection of the Commissioner's original determination.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 203.—October Term, 1930.

David Burnet, Commissioner of Internal Revenue, Petitioner, *vs.* William Hobart Porter and Andrew W. Porter, Executors of the Estate of William W. Porter, Deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 13, 1931.]

Mr. Justice Sutherland delivered the opinion of the Court.

William W. Porter was a subscriber in the sum of $75,000 to the fund described in our opinion handed down this day in No. 199, *Burnet* v. *Houston, ante,* p. —. The facts in the present case are the same except that the Commissioner of Internal Revenue first approved the deduction and allowed a claim for refund of the proportional part of the tax, and then some time later reopened the case, disallowed the deduction and redetermined the tax. The court of appeals sustained the power of the commissioner upon the authority of *McIlhenny* v. *Commissioner of Internal Revenue,* 39 F. (2d) 356; and was clearly right in doing so. That court, however, upon the main point, following its decision in the *Houston* case, reversed the determination of the Board of Tax Appeals in favor of the government. 39 F. (2d) 360. This is contrary to our decision in No. 199, and upon that authority the judgment is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.